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STATUTE LAW MAKING

IN THE

UNITED STATES

BY

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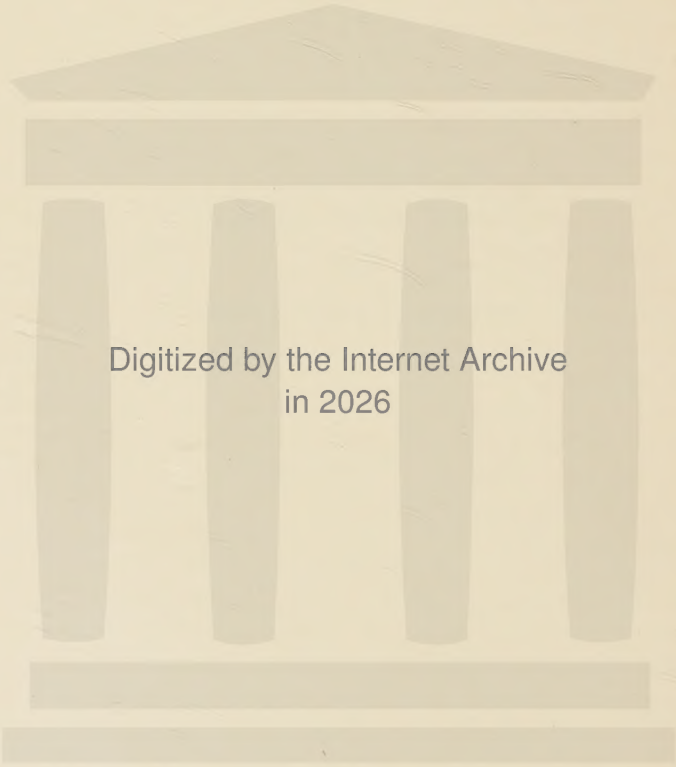
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PREFACE

Since law is becoming so important a factor in shaping the economic and social conditions under which we live, it is essential that the making of statutes should receive greater attention. In no other great country of the world is the passage of new statutes and the change of old ones so easy as in the United States. The amount of legislation increases year by year, the laws touch us more and more intimately in our daily lives. Under such conditions it seems that it would be only natural that great care would be taken in the framing of statutes. Those who drafted measures we might believe would be sure to see to it that rights not intended to be affected were not touched, that what the bill was intended to accomplish was done in the easiest way and that the law should not offend constitutional provisions. But the fact is quite the contrary. Our love of freedom of initiative has extended to legislation. Bills are introduced in such numbers that it is impossible for them to receive adequate consideration. They are often drafted by men who have not made any attempt to see the proposed measures in the perspective of the general law of the state. As a consequence we have a mass of ill-considered statutes which, by their indefiniteness and failure to observe constitutional limitations, throw upon the courts a burden of interpretation which forces them frequently to resort to judicial legislation and to declare the statutes void. Popular prejudice is aroused against the judges who, because laws well intentioned but poorly drawn are declared void, are

charged with being an obstruction to needed social advance. The blame which should fall upon the careless draftsman of the law too often is shifted to the court. But even if the bill stand the test of constitutionality, if it is not well drawn, it fails to accomplish its purpose. American legislation furnishes examples without number of laws which are weak or altogether powerless. Those who draft the statutes are prone to forget that a declaratory law is usually a nullity, and if any rule is to be enforced, adequate administrative machinery must be provided. The object of this book is to outline the means by which these defects may be avoided.

Most of our texts on statutes confine their attention to the interpretations given by the courts. We need not only an understanding of the standards which must be observed under the constitutions, but a knowledge of the means which may be used to increase the definiteness of the law and the efficiency of its enforcement. The study of our constitutions is so important, and with the increase in size of our state constitutions has tended to become so absorbing, that we are apt to forget that after all the constitution is "the frame of government," not its living substance. It is only the point from which the statutes start in the attempt to insure the fullest life to the citizen. It is increasingly true in our generation that the test of good or bad government lies in the nature of the statute law and its enforcement. There is no subject more worthy of study than the means by which we can insure that the standards of conduct which our laws enjoin shall be clearly stated and efficiently enforced.

A study of the problems of statute law as illustrated by the work of the Wisconsin legislature and questions raised by my students in the course on Theory and

Practice of Legislation form the background from which this book is written. Many of the illustrations are drawn from the practical difficulties which confront the legislative draftsman, others have been brought out by the theoretical questions arising in class discussions. By both these influences the point of view has been largely shaped.

To Dr. Charles McCarthy, head of the Wisconsin Legislative Reference Library, I am indebted for constant counsel and criticism during the writing of these chapters. His long and intimate association with lawmaking in Wisconsin has given him a wealth of political experience and insight which he was always ready to place at my service. I am under obligation to the officers of the State Law Library for numerous favors extended by them, and to Mr. Raymond M. Zillmer, Assistant in Political Science at the University of Wisconsin, who has criticized the manuscript and verified the references.

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I

Limitations on Legislative Action

STATUTE LAW MAKING

CHAPTER I

THE DEFECTIVE ORGANIZATION OF THE LEGISLATURE

The public hears little in defense of the state legislator. The "grist" of bills turned out is made the butt of ridicule by the press and by the bar. There is little attempt to understand why our laws are so often petty, poorly phrased, and unconstitutional under both the State and Federal constitutions. We do not try to keep clearly in mind the limitations we have placed on normal legislative action. We do not realize that in constructing political machinery which cuts down the power of the legislature for evil, we have cut down also its power for good. When we are aroused against a specific abuse the temptation is to resort to a local application to counteract the evil result, rather than to look deeper to find the underlying cause which, if unremedied, will prevent any permanent cure.

Some of the difficulties under which our legislatures work can be removed without any important change in our constitutional traditions, others are permanent, or at least they will not be removed until radical change is made in the foundations upon which legislative power in America rests.

The Decentralized Responsibility for Legislation

The chief of these latter handicaps is the lack of a centralized responsibility for legislation. The early distrust of party decentralized control over legislation. It was feared that party loyalty could not but result in partisanship. Parties in the national government were to be excluded from any share in the choice of the chief executive. The framers of the constitution hoped that the activities of parties could be restrained so that they would not seriously interfere with the choice of the wisest and most public spirited as members of the legislatures. There was no large number who urged that the political organization should avowedly be made the instrument by which the best men were to be selected. Party responsibility was not urged, because it was the general belief that a party would always be irresponsible.

The early state constitutions also embodied this idea and the later ones have followed their example. At no time in the history of the United States has there been an avowed constitutional acceptance of the idea that the party furnishes the logical means of controlling the legislature and legislation. Parties have always been extra-constitutional, they have until a comparatively recent date been extra-legal. A man's membership in his party was like his membership in his club — a matter of individual preference, and it was not considered that in the management of the affairs of a party the public had a greater right of control than in the case of any other social organization.

We have now discarded the idea that the parties should not be regulated in the public interest. Their legalization has become, within the last two decades, the leading feature of our political legislation. Slowly, very slowly, we have come to recognize in law that for four

generations we have neglected the control over party politics which is so essential to proper lawmaking.

The second step toward responsibility is to make the party not only accountable to the public for the way in which it elects the legislators, but responsible for the policy which the legislators put into law. To do this is more difficult than to control the elections, for it involves the creation of constitutional machinery built on a party basis, a step not yet taken by any of our American commonwealths. Outside the constitutions, by custom, legislative rule and statute, numerous attempts have been made by the parties themselves to assume a rôle which would join responsibility with power. But it is still true that the real basis of our legislation, though not of our elections, is the individual legislator and not the party. The unregulated caucus to determine party candidates is fast disappearing, but the unregulated party caucus to determine party policy in the legislature remains, and must remain until a responsible position is created for the party in the government. Extra-constitutional developments, such as that of the power of the speakers in the legislatures, have so far proved either insufficient checks against the pressure of the demands of individual members or have threatened to bring an abdication of control over legislation by the majority to its leader. No means has been developed in America by which the party can be called before the bar of the house to answer for its policy on specific measures. Except for the indefinite and distant responsibility which the party owes to public opinion at the time of the elections, we deliver over the control of our governmental policy into the hands of a body in which each member may urge his sectional interest at will, with only the remotest attention to his larger responsibility to the state.

The lack of control casts a shadow over every branch of our lawmaking, from appropriations to game laws. Mr. A. wants a longer open fishing season for his county, Mr. B. an increased appropriation for the normal school in his county, and Mr. C. wants a bridge or a franchise for a dam on a navigable stream, or an increase in the salary of the county judge. Nowhere in the whole framework of the constitution is there a rule which forces the members at every point to justify their actions by measuring them with the general public interest.

But this is a difficulty which arises from the historical development of our constitutions, and one so firmly fixed in our national traditions that the only means by which its disadvantages can be avoided is to build up extra-constitutional means of enforcing party responsibility. The so-called "steering committees," the joint-finance committees, and others of a similar sort, show a "*feeling out*" after some broader basis of party responsibility in our legislatures; but the results of such efforts have been disappointing.

Constitutional Limitations

A second handicap of the legislature is found in our constitutions, especially our later state constitutions. Clauses inserted to remove specific abuses may obstruct the passage of necessary laws. The legislator often finds that he must put himself in the weak moral position of trying to defeat the spirit of the constitution while observing its letter.

Our early constitutions made no attempt to outline a code of law. Some of them were known as "*frames*" of government, an expression indicating the intent of those who made them. The great body of law was to be filled in by the legislature; the constitution was to stand as the general declaration of principles which

should always be found in a republican government. Our later constitutions have included an ever increasing body of concrete rules drawn with some local or temporary abuse in view. By putting the rule in the constitution it was thought to protect it against the possibility of easy repeal should the people subsequently, through their legislature, decide that it should be modified. When legislators wrongly used their power, resort was had to taking the power permanently away from them instead of taking the legislator out of power at the succeeding election. As a result of this process our constitutions are padded with restrictions, which make the legislator no longer a free agent in the proper field of legislation and encourage resort to subterfuge by which that may be accomplished indirectly, the doing of which is forbidden.

There is no sound principle in the *constitutional* provisions which include a code on corporations — going into details as much as any statute, specifying who may ride on passes on railroads and how the corporation commission shall organize. Regulation of the hours of labor, factory legislation, anti-lobbying provisions, employers' liability, abolition of the fee system of paying officers, these have no legitimate place in a constitution.[1]

A constitution is defined as "the fundamental law of the state," but if it is to contain the rules of every-day life it differs from ordinary legislation only in name and rigidity. Its rules are not different from statutes because they are of general character, but only because they are hard to change. Whatever the reason urged for making constitutions detailed, there can be but one fundamental explanation — the

[1] For rules of this sort see the Constitution of Oklahoma, 1907.

belief that the legislature is untrustworthy. A detailed constitution is a confession of doubt in the efficiency of representative government. By a curious lack of clear reasoning an attempt is made to guarantee the rights of the people by making the constitution a code of law which the people will find hard to change. This is a procedure which in fact admits that the people can not or at least do not control their representatives, and that the constitutional convention rather than the legislature is to be relied on for lawmaking.

Further, constitutional principles, properly so called, do not change, or, at least, are subject only to the slow modification brought by gradual transformation of the national life; but these "laws in the constitution" need readjustment just as laws outside the constitution do. To insert such provisions either encourages constant tinkering with the law supposed to be "fundamental," or necessitates the nullification of the spirit of the rule while its letter continues to be observed.

The evil of restricting the legislature to a small field is least prevalent in New England where, especially in Massachusetts, the General Court is still almost in the position in which it was at the time of the Revolution. Except for a few restrictions on finance powers and some general and usually directory provisions concerning education and the militia, there are almost no bounds placed upon what can be done by law. Maine, it is true, long had constitutional provisions concerning liquor, but in contrast to many of the western and southern constitutions this was practically the only branch of social regulation the constitution attempted. Provisions governing special, local and private legislation are almost non-existent in New England. The South and West have gone to the other extreme. Recent constitution making shows that the desire to make

the regulations comprehensive cannot be said to be confined to any single section of the country.

The tables below show the number of pages covered by the constitutions of the thirteen original states, at various periods, and the extent of the change in a few of the more conspicuous instances in other parts of the country.

LENGTH OF CONSTITUTIONS

State	Year of Original Constitution	Length	Year of Present Constitution	Length[1]
Connecticut	1818	11	1818	20
Delaware	1792	13	1897	36
Georgia	1789	8	1877	34
Maryland	1851	29	1867	47
Massachusetts	1780	23	1780	34
New Hampshire	1784	17	1792	19
New Jersey	1844	13	1844	15
New York	1821	12	1894	42
North Carolina	1776	7	1876	22
Pennsylvania	1790	11	1873	31
Rhode Island	1842	13	1842	18
South Carolina	1778	9	1895	38
Virginia	1830	9	1902	58
Alabama	1819	18	1901	52
Louisiana	1812	12	1898	95
Mississippi	1817	16	1890	47
Missouri	1820	19	1875	50
Montana	1889	42	1889	42
New Mexico	1911	47	1911	47
North Dakota	1889	42	1889	42
Oklahoma	1907	73	1907	73

[1] Includes amendments where any have been adopted. Comparison made from Thorpe, American Charters, Constitutions and Organic Laws, except the figures for the Constitution of New Mexico, which are taken from Sen. Doc. 61, Cong. 3d sess. Doc. 835.

With the growth of constitutional limitations the position of the legislature in relation to the constitution has approached the relation of the city to the legislature — it has tended toward the standard of a body of strictly delegated powers instead of being as it once was, a body of original powers guided by a few general rules. No element has contributed more to deaden popular interest in the work of the legislature than the pruning of its powers. Even if the members were chosen from small constituencies, or on bases which made the representation undemocratic, it might still be true that their work would command public attention if they possessed power restrained only incidentally by constitutional limitations. To the degree that the hands of the legislature are tied, its work becomes unimportant and lacks interest not only for the legislator himself but for his constituents. The reflex upon the character of candidates and elections is unmistakable.

Salaries

About half of the states make the unfortunate mistake of fixing the salaries of the legislators in their constitutions.[1] Uniformly the payment is too small to make adequate return for the sacrifice demanded. Even where the constitutions are silent the salaries of legislators still continue so low that an acceptance of the office often means an actual money sacrifice. We cannot hope that the great proportion of our legislators shall be drawn from the highest talent that the state affords, but we should see to it that the remuneration is not such that only men of means and those to whom even a low salary is attractive will be able to serve. To keep the salaries low is one of the best ways in which

[1] See a discussion in Dealey, Our State Constitutions.

to insure a mediocre legislature. We do not have in America a large body of men of independent means who devote themselves to the public service from civic pride and the honor that attaches to the positions. We must rely for the most part upon men who cannot afford to sacrifice their own interests to those of the public, or at least cannot afford to do so for a succession of years, as is necessary if the state is to reap the advantage of their previous legislative experience. The salary of the legislator should therefore be a reasonable return for the sacrifice which an average citizen would be called upon to make.

Poor payment of legislators is the poorest investment a state can make. The salaries we pay are high enough for the small politician who is not too careful of the subsidiary income which may come his way, but they are not high enough to secure the continued service of our solid citizenship. No way could be devised surer to work to the advantage of the lobbyist than putting the salary of the legislator low. The argument is strongly forced home by the following table showing the time and length of sessions and the salaries paid in the different states and territories.

STATE AND TERRITORIAL LEGISLATURES[1]

State or Territory	Years	Sessions	Month and Day
Alabama	Odd	Quad.	Second Tuesday, January
Arizona Ter.	Odd	Bien.	Third Monday, January
Arkansas		Bien.	First Monday, January
California	Odd	Bien.	First Monday, January
Colorado	Odd	Bien.	First Wednesday, January
Connecticut	Odd	Bien.	Wednesday after first Monday, January
Delaware	Odd	Bien.	First Tuesday, January
Florida	Odd	Bien.	First Tuesday, April
Georgia		Ann.	Fourth Wednesday, October
Hawaii Ter.		Bien.	Third Wednesday, February
Idaho	Odd	Bien.	First Monday, January
Illinois	Odd	Bien.	Wednesday after first Monday, January
Indiana	Odd	Bien.	Thursday after first Monday, January
Iowa	Odd	Bien.	Second Monday, January
Kansas	Odd	Bien.	Tuesday after second Monday, January
Kentucky	Even	Bien.	Tuesday after first Monday, January
Louisiana	Even	Bien.	Second Monday, May
Maine	Odd	Bien.	First Wednesday, January
Maryland	Even	Bien.	First Wednesday, January
Massachusetts		Ann.	First Wednesday, January
Michigan	Odd	Bien.	First Wednesday, January
Minnesota	Odd	Bien.	Tuesday after first Monday, January
Mississippi	Even	Bien (*c*)	Tuesday after first Monday, January
Missouri	Odd	Bien.	Wednesday after first day, January
Montana	Odd	Bien.	First Monday, January
Nebraska	Odd	Bien.	First Tuesday, January
Nevada	Odd	Bien.	Third Monday, January
New Hampshire	Odd	Bien.	First Wednesday, January
New Jersey		Ann.	Second Tuesday, January
New Mexico Ter.	Odd	Bien.	Third Monday, January
New York		Ann.	First Wednesday, January
N. Carolina	Odd	Bien.	Wednesday after first Monday, January
N. Dakota	Odd	Bien.	Tuesday after first Monday, January
Ohio	Even	Bien.	First Monday, January
Oklahoma	Odd	Bien.	Tuesday after first Monday, January
Oregon	Odd	Bien.	Second Monday, January
Pennsylvania	Odd	Bien.	First Tuesday, January
Porto Rico Ter.		Ann.	Second Monday, January
Rhode Island		Ann.	First Tuesday, January
S. Carolina		Ann.	Second Tuesday, January
S. Dakota	Odd	Bien.	Tuesday after first Monday, January
Tennessee	Odd	Bien.	Second Tuesday, January
Texas	Odd	Bien.	Second Tuesday, January
Utah	Odd	Bien.	Second Monday, January
Vermont	Even	Bien.	First Wednesday, October
Virginia	Even	Bien.	Second Wednesday, January
Washington	Odd	Bien.	Second Monday, January
W. Virginia	Odd	Bien.	Second Wednesday, January
Wisconsin	Odd	Bien.	Second Wednesday, January
Wyoming	Odd	Bien.	Second Tuesday, January

(*a*) All states and territories pay mileage except Delaware and New Jersey. Ne
Jersey gives its legislators free transportation on all railroads.
(*b*) Extra sessions 20 days with pay.
[1] Michigan Manual, 1909.

nit of ssion	No. of Senators	Term of Senators (years)	No. of Rep's	Term of Rep's (years)	Salaries (*a*)
days	35	4	106	4	$4 per day.
days	12	2	24	2	$4 per day.
days	35	2	100	2	$5 per day.
days	40	4	80	2	$8 per day.
days	35	4	65	2	$7 per day.
	35	2	255	2	$300 per annum.
days	17	4	35	2	$5 per day.
days	32	4	68	2	$6 per day.
days	44	2	175	2	$4 per day.
days	15	4	30	2	$400 regular; $200 extra session.
days	23	2	51	2	$5 per day.
	51	4	153	2	$1,000 regular; $5 per day special session.
days	50	4	100	2	$6 per day.
	50	4	108	2	$550 per regular session.
days	40	4	125	2	$3 per day.
days	38	4	100	2	$5 per day.
days	42	4	115	4	$5 per day.
	31	2	151	2	$150 per annum.
days	27	4	101	2	$5 per day.
	40	1	240	1	$750 per annum.
(*b*)	32	2	100	2	$800 regular; $5 per day extra session.
days	63	4	119	2	$500 per annum.
	45	4	136	4	$400 regular; $5 per day special session.
days	34	4	142	2	$5 per day for 70 days; $1 per day thereafter.
days	27	4	73	2	$6 per day.
days	33	2	100	2	$5 per day.
days	19	4	48	2	$10 per day.
	24	2	390	2	$200 per term.
	21	3	60	1	$500 per annum.
days	12	2	24	2	$4 per day.
	51	2	150	1	$1,500 per annum.
days	50	2	120	2	$4 per day.
days	47	4	99	2	$5 per day.
	34	2	117	2	$1,000 per annum.
days	44	4	109	2	$6 per day for 60 days; $2 per day thereafter.
days	30	4	60	2	$3 per day.
	50	4	207	2	$1,500 per annum.
days	11	4	35	2	Members of lower house, $5 per day. (*d*)
	38	1	72	1	$5 per day not exceeding 60 days
	42	4	124	2	$200.
days	45	2	104	2	$5 per day
days	33	2	99	2	$4 per day.
	31	4	133	2	$5 per day for 60 days, $2 per day thereafter.
days	18	4	45	2	$4 per day.
	30	2	246	2	$3 per day.
days	40	4	100	2	$500 regular; $250 extra session.
days	42	4	95	2	$5 per day.
days	30	4	87	2	$5 per day.
	33	4	100	2	$500 per annum.
days	27	4	56	2	$5 per day.

Special sessions, limited to 30 days, are held alternately with regular sessions.
One member of upper house receives $5,000, four members $4,000 each, and six
ers $3,000 each, per annum.

Short Terms

An aggravation of the disadvantage of low salaries is the evil of short terms, now less flagrant than formerly when annual elections were more popular. An important part of the legitimate expenditures of a legislator is his election expense. If, when elected, he were to represent the people for two sessions he would find public service much less of a drain upon his resources than at present. But the term for the lower houses is usually two years and for but one session. The senates, fortunately, as a rule hold for a longer period, only a part retiring at one time. The result of short terms is that in the average American commonwealth, energy that should be devoted to legislation is devoted to ballot battles. After one session is over and if he is again a candidate, the legislator does not turn to see what he should do in the next legislature, but what he must do to be a member of the next legislature. The biennial recurrence of the elections exhausts the energy and enthusiasm of the member. His salary hardly meets his expenses; it certainly is insufficient to support his family. After a first term he concludes to let someone else try it; he gives way to a "green" man who must spend his time in "learning the ropes." This succession of new recruits, under our present system, is one of the main causes of the mass of poorly drawn laws for which the legislature is blamed. It needs no argument that, other things being equal, the larger the number of inexperienced men in the legislature the poorer the legislative product. The difficulty under which we work on this account appears in the statistics of length of service as shown in biographical sketches in some of the legislative manuals. In the Minnesota House of Representatives in the session of 1911 there were one hundred and twenty members, seventy-five of whom had never served in

the legislature before. Forty-five had served before, twenty for two terms and seven for three terms.[1] In the House of Representatives of Missouri in the session of 1911, there were one hundred and two new members and forty-one who had seen service before, and of these, twelve for two terms and seven for three terms.[2] Of the ninety-five members of the North Dakota House in 1909, seventy-one were new men and twenty-four had served before, and of these six for two terms.[3] In the Vermont House of Representatives of two hundred and forty-six members in 1910–11, twenty-two — less than ten per cent — had served before, and of these, nine for two, five for three, three for five and two for six terms.[4]

Limitations of Number and Length of Sessions

One of the favorite ways to reduce the evil of "over-legislation" has been to cut down the number of sessions and even to limit the time the legislature may remain in session. No better example can be found of our patchwork methods of treating the problem of law-making. The result of attempts to cram legislation into short periods has not been to lessen the number of "bad laws," nor to lessen the number of laws passed. When public opinion, working through our present legislative machinery, demands legislation, the legislation will be passed. If the sessions are held biennially, as is now the general practice, more work must be done than if held annually. If the sessions are not only limited as to frequency, but also as to length, there can be

[1] Legislative Manual, Minnesota, 1911.
[2] Official Manual of the State of Missouri, 1911–12.
[3] North Dakota Blue Book, 1909.
[4] Vermont Legislative Directory, 1910.

but one result. The effort will be made to crowd through all the legislation public opinion demands, with the result that the lawmaking will be crude and haphazard. On non-contentious subjects, the legislature will be tempted to abdicate its responsibility by turning over the actual decision to the governor.[1]

The constitutional rules concerning legislative sessions and the legislative experience under them furnish an interesting lesson. The constitutions of three states still mirror the old partiality for the legislatures, in their general provisions that the legislature shall be frequently convened.[2] Six states provide for annual sessions.[3] The majority are satisfied with biennial sessions, generally in the odd years. Alabama alone has quadrennial sessions. The newer constitutions have not favored annual sessions. In Pennsylvania, where the constitution prohibits the practice, there are often adjourned sessions held in the intervening years. In Ohio, in fact, the annual session returned as the regular practice under the subterfuge of the adjourned session. In most of the states too, the governor has power to call special sessions on extraordinary occasions, but in the newer states it is often provided that the legislature can then legislate only on the subjects covered in the governor's proclamation.

Practice often warps constitutional theories and the frequency of legislative sessions is a case in point. There seems to be a tendency toward going back to the old annual session, either through the means of a governor's

[1] New Jersey, Pennsylvania and California especially have suffered from willingness of the legislature to surrender its functions in this way.

[2] Mass. 1, 22; Md. Dec. of Rts. 12; S. C. 1, 3.

[3] Ga. 1891 p. 55; Mass. Amdt. 10; N. J. 4, 1, 3; N. Y. 10, 6; R. I. Amdt. XI; S. C. 3, 9.

proclamation for an extra meeting, or by an adjourned session. With the growth of population our needs are becoming more complex and the legitimate demand for frequent adjustment of statutes to conditions is more insistent. The statistics of extra and adjourned sessions show that public opinion is working to free the legislature from the bonds under which it was sought to place it by making its meetings infrequent and short.

Legislative Procedure

Systems of legislative procedure have never been a favorite field for study. Dry and uninteresting rules seem to lack all vital connection with the living forces of our times. Yet nothing contributes more to success or failure than the *norms* which the legislature sets for the carrying on of its own business and the efficiency with which the presiding officers enforce these rules. Good rules well enforced will expedite business, afford proper consideration in committee, and opportunity for all parties to be heard in debate. They will adjust the conflicting interests of the houses. Attention will be concentrated on large public measures, the party platform will be carried out, making possible normal political life, and the growth of a feeling of party responsibility. Private and local legislation will be forced to a secondary position and the opportunity for log rolling and the lobbyist reduced to the minimum.

It is needless to say that these advantages have been fully realized in none of our hundred legislative bodies, but the contrasts which are found in the rules in force and the evident relation which the rules bear to the legislative product indicate the importance of working out for each body rules of procedure which shall fit its needs.

Parliamentary law, since it rests entirely on the present will of the body which it controls, should be apparently so fluid that there would be no doubt that it could at once conform itself to every need of legislative action. Yet the contrary is the case. However anxious the legislatures seem to be to facilitate the change of statute law, they approach the rules governing their own procedure with trembling hands. The question what shall be made law, is approached with confidence; the formal rules under which it is to be done, with trepidation. Once firmly established as the practice of a legislature, a scheme of procedure is seldom subjected to thorough revision to bring it up to present needs. Not only is there a marked lack of initiative in changing a code already in use, but the new states hesitate to experiment for themselves and have usually been content to follow the precedents already familiar.

The parliamentary law in force in our legislatures shows three general classes, corresponding roughly to three periods in our national development. In one class fall the states of the Atlantic coast, in another the southern and western states of the period before the Civil War, in a third the new states of the West admitted after the Civil War.

Within these three classes the influence of congressional procedure varies both as to degree and the time at which the influence made itself felt. Different state precedents also may be traced, due to the origin of the population or the influence of some commanding personality over the procedure of the early sessions. Features of Virginia, Pennsylvania and Massachusetts practice often crop out in the legislatures of the middle West.

Massachusetts typifies the best practice of the eastern states. The influence of Congress upon her procedure is negligible. Almost three centuries of experience

have built up for her a procedure largely indigenous. It has not been a ready-made system adopted to fit needs that might develop, but a growth, not always logical nor free from survivals of worn-out forms, but one which arose to fit the peculiar needs of the state. In spite of the two hundred and forty members who compose the lower house, the characteristics of the town meeting are largely preserved. A joint committee system divides the business between the two houses so that time and effort may not be wasted through the passage by both houses of bills on the same subject-matter. Monitors appointed by the speakers aid in keeping order and in returning the number of votes of the members. The efforts of the members are not dispersed among a multitude of large committees. There are in the House of Representatives only seven standing committees, and in the Senate only five. These are for formal duties such as third reading and engrossment. Most of the work is done by joint committees, of which there are thirty, of eleven to fifteen members. A member of the lower house may serve on only two committees at the same time, a senator rarely serves on more. Bills are considered in the order of introduction except where otherwise ordered by a four-fifths vote. The finance committee is given comprehensive powers, arming them with numerous opportunities for testing the form of the bill. The time for discussion is equitably divided between the parties. Provision is made for bringing proposed legislation to the notice of those to be affected. A large number of similar regulations, which in too many states have found their way into the constitutions, are enforced by the legislature on its own initiative.[1]

[1] Manual for the General Court, 1911.

At the other extreme stands Illinois, which represents the states admitted before the Civil War. Unlike some of her sister commonwealths, she did not adopt the practice of one of the older states nor experiment for herself. Congressional procedure was taken over, often almost verbatim for paragraphs. Unfortunately congressional procedure in 1818 was not a good model. In addition, Illinois grew so rapidly that the evil results which came from the use of inefficient machinery were accentuated to a greater degree than anywhere else in the Union. The growth of resources and population rapidly transformed the life of the state, but there was no corresponding revolution in procedure.

The Senate increased from fourteen members in 1818 to fifty-one, the House from twenty-seven to one hundred fifty-three. But the legislative tools remained unchanged though the legislative harvest increased in importance and the legislators increased in number. An example of the difficulties put in the way of normal legislation is given by the cumbersome committee organization still in use. There are in the House sixty-eight committees, the largest, the committee on finance, having forty-four members. The committees with less than fifteen members can be counted on the fingers of one hand. Members of the House each serve, on the average, on more than twelve committees. The Senate has forty-one committees, of an average size of twenty. Some men serve on as many as twenty-two committees and comparatively few on less than sixteen.[1] Needless to say, such organization is not worthy of the name and reduces the committee system to an absurdity. Taken with the other defects in the rules, the committee system

[1] Figures taken from List of Members, Forty-Seventh General Assembly of Illinois, 1911, J. A. Rose, Sec. of State.

of Illinois makes normal legislative action all but impossible. The natural result is that political ringsters find a fertile field for their work. To push legislation through, power must be concentrated in the hands of a few, who are governed by no rules and cannot be held responsible by the honest but unorganized majority. Business cannot be carried on under the rules, so it is rushed through under "suspension of the rules," and the actual procedure even at other times often bears only a faint resemblance to that pictured by the regulations.

Other states of this group are not so unfortunate. Some were admitted at a time when congressional procedure had grown to meet our modern needs, others drew from state experience to a greater extent, and still others introduced, by their own initiative, important modifications to suit their individual needs.

The far West is the land of experiment in matters of legislative procedure as well as in legislation proper. Washington, Oregon, and the states of the Rocky Mountain region, to a greater extent than the older commonwealths, have borrowed from various other states procedure which has proven successful there; they have also experimented on their own account. Too much reliance is not to be placed upon their experience, however, for in no case have the methods employed been put to the tests which those of the more thickly populated eastern states must endure.

The rules of the legislature of Oregon, for example, cover only thirteen octavo pages and are almost as simple as those of a debating society. They show a simple committee system, only one committee of the lower house having as many as seven members. There is provision for full discussion of all bills, especially financial measures. Opportunity for debate and vote

on the bills by clauses, at three different times, reduces the danger of extravagance and the abuse of "riders."

Procedure is not a solution for all legislative ills, indeed it is at best a neutral element. A bad system of procedure may prove almost as great a hindrance to good legislation as weak legislators. The importance of making our party machinery such that it will run easily to express the people's will, we are beginning to appreciate. How important it is that our legislative machinery should be made to run easily, so that it may not block the people's will after election, we do not yet comprehend.

The Use of Experts in Legislation

The determination of policies in democratic governments must always be in the hands of amateurs. The actual carrying out of policies may be in the hands of permanent public servants who by training and experience become experts. But government by party, with popular control of party policies, means that the executive and the legislature are left in the hands of men whose interest as a rule lies in private rather than in public affairs. Were this not true there would be no basis for true party organization.

The English government furnishes the best example of the adjustment of the relations of expert service and democratic control. Those who settle what shall be done draw their authority from popular election and act through a committee, a cabinet, which is at all times responsible to the legislature. If "the government" changes, little over thirty administrative positions become automatically vacant. Those who carry out the policy determined upon are in permanent government employ. The people at the elections approve or disapprove the *policy* of their temporary servants.

These servants exercise control over the policy of administration but do not interfere with the rank and file of the permanent public service. A similar division is found in the formal making of the laws. Control over the content of bills is left in the hands of the legislature, control over the form is delegated to a separate set of officers who by long training have become expert in setting forth in clear language the legislative purpose proposed for adoption.

The advantage of these arrangements is evident. By removing questions of patronage and relieving the legislator of the necessity of making the language of statutes correspond with the intent, the efforts of the legislature can be devoted to decisions on policy. Ministerial duties are reduced to a minor position and discretionary powers are given their proper importance. Debate on public policy takes the place of debate on the formal details of phraseology in the law.

America has been slow to adopt similar expedients. The power of patronage in our Federal government was long a corrupting influence in our party politics and a disturbing factor in legislation. The Federal civil service law of 1883, with its subsequent modifications, has removed the greater number of the public servants from active participation in politics, but Federal offices are still an influence in politics and it often seems that the cutting down of the places for distribution has only sharpened the controversy in the legislature over the control of those remaining. In many of the states a non-partisan civil service is still a distant ideal and in no case has a standard satisfactory to those anxious for efficient government been attained. Nevertheless we may regard the use of the expert permanent servant in administration as an accepted American policy. A movement is in process also to free the

legislatures from the consideration of the details as opposed to the policy of acts.

The widespread recent use of commissions illustrates a desire of the legislature to escape from the consideration of details of the administration of the law. Contemporaneous though not yet so general has been the development of means to free the legislatures from the clerical work involved in preparing bills.

Legislative Reference Libraries

Two branches have developed in this work: one covers the collection of information for the use of the legislature, the other the drafting of measures proposed for enactment. One of the first to head a department of this kind describes the elements essential in organizing and carrying on the work.

"1. The first essential is a selected library convenient to the legislative halls. This library should consist of well-chosen and selected material. A large library is apt to fail because of its too general nature and because it is liable to become cumbersome. This library should be a depository for documents of all descriptions relating to any phase of legislation from all states, Federal government, and particularly from foreign countries like England, Australia, France, Germany and Canada. It should be a place where one can get a law upon any subject or a case upon any law very quickly. It is very convenient to have this room near to a good law library. Books are generally behind the times, and newspaper clippings from all over the country and magazine articles, court briefs, and letters must supplement this library and compose to a large extent its material.

"2. A trained librarian and indexer is absolutely essential. The material is largely scrappy and hard to

classify. We need a person with a liberal education, who is original, not stiff, who can meet an emergency, and who is tactful as well.

"3. The material is arranged so that it is compact and accessible. Do not be afraid to tear up books, documents, pamphlets, clippings, letters, manuscripts or other material. Minutely index this material. Put it under the subjects. Legislators have no time to read large books. We have no time to hunt up many references in different parts of a library. They should be together as far as possible upon every subject of legislative importance.

"4. A complete index of all bills which have not become laws in the past should be kept. This saves the drawing of new bills and makes the experience of the past cumulative.

"5. Records of vetoes, special messages, political platforms, political literature, and other handy matter should be carefully noted and arranged. Our legislator often wants to get a bill through and we must remember that he often relies as much upon political or unscientific arguments as we do upon scientific work. He should be able to get hold of his political arguments if he wants to, and the political literature from all parties upon all questions should be kept near at hand.

"6. Digests of laws on every subject before the legislature should be made and many copies kept. Leading cases on all these laws and opinions of public men and experts upon the working of these laws or upon the defects, technical or otherwise, should be carefully indexed and as far as possible published in pamphlet form, with short bibliographies of the subjects most before the people.

"7. The department must be entirely non-political and non-partisan or else it will be worse than useless.

If you have the choice between establishing a political department and no department at all, take the latter.

"8. The head of the department should be trained in economics, political science, and social science in general, and should have also a good knowledge of constitutional law. He should, above all, have tact and knowledge of human nature.

"9. There should be a trained draftsman connected with the department — a man who is a good lawyer and something more than a lawyer, a man who has studied legislative forms, who can draw a bill, revise a statute, and amend a bill when called upon to do so. Such a man, working right with this department and the critical data which it contains, will be absolutely essential."[1]

The last-mentioned branch of legislative reference work is the latest step in the delegation by the legislature of its routine work. It has developed to a greater degree in Wisconsin than in any other state. The plan there followed may be summarized as follows: The use of the facilities offered is optional with the member who introduces the bill. He may frame the bill himself or have any one else do so; he may introduce the measure without any recourse to the official drafting room, or officials paid by the public will draw up the measure for him. In point of fact the draftsmen paid by the state have done work so satisfactorily that the bill drawn elsewhere is exceptional. If the member wishes to have the bill drafted in the Legislative Reference Department he must submit a signed rough draft of the measure. The bill is drawn promptly and delivered to the member in complete form, ready for introduction.

[1] Charles McCarthy, in American Library Ass'n Papers and Proceedings, Portland Conference, 1905, p. 244–5.

The one introducing it does not bother about technical details, but confines himself to the substance and the policy of legislation.

To supplement the work of the official draftsman by checking inaccuracies which may have crept into bills, whether drawn by the public draftsmen or independently, the legislature has created a joint committee on revision, of three members from the Senate and five from the Assembly. This body reviews the bill to see that it complies with all the rules as to form. The actual work in this revision is done by attorneys, who act as clerks to the committee. When a bill is reported as in proper form it is then read the first and second times and takes the usual course. If it is not approved as to form it is at once returned to the member who offered it, to be changed in the manner specified. By the creation of official draftsmen, and the revision committee, the legislature has established machinery which is a powerful agent in improving the technical form of legislation.

Not all Legislative Reference Departments cover so wide a field of activity as in Wisconsin. The greater number confine themselves to collecting material, and the drafting of bills is incidental or not undertaken at all.[1] The following states now have laws establishing this sort of work: Alabama, Indiana, Michigan, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Texas and Wisconsin. In California, Connecticut, Iowa, Kansas, Massachusetts, New York and Virginia, the state libraries carry on legislative reference work without specific legislation on the subject.[2]

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[1] A discussion of the fields covered by different Legislative Reference Bureaus is included in the Report of the Librarian of Congress, April, 1911, Legislative Reference Bureaus.

[2] Op. cit. Exhibit 5, p. 194 *et seq.*

The lack of technical aid continues to be one of the important handicaps of American lawmaking bodies. Illogical as it seems, official means by which the experience of other states and countries in the field of legislation can be brought within reach of the lawmaker are still the exception. The result is that laws long proven inefficient in one state are often copied by other states with no knowledge of the defects, and the drafting of bills remains in the hands of voluntary agents who by the limitations of their training increase the indefiniteness of the statutes and the chance that their provisions will clash with the commands of our constitutions.

Many of the defects in the organization of the legislatures can be removed only by the slow processes of constitutional change. But improvement in the language of laws is within our immediate reach. Whether the work be done by official draftsmen or through other agencies, no effort should be spared to improve the form of our statutes and to insure that they shall not offend our constitutional limitations. This is an advance which can be made by every one who assumes the responsibility of drafting a law. Much of the criticism now levelled at our lawmaking bodies arises from the failure to observe well-established rules as to logical arrangement of material and the legal meaning of words. The same defect lies back of much of the criticism of the courts. The authors of a poorly phrased though well-intentioned law which is declared to be unconstitutional or to have accomplished something which it did not intend, too often blame not their own failure to put the law in proper form but the "extreme conservatism" of the judiciary.

The rules discussed in the following chapters are demanded not only by court decisions, but by good practice. Our standard should be to use language which

the court will find sufficient to express the intent, and which will in addition make clear to the legislator, the administrative official and the layman, exactly what the law commands.

CHAPTER II

CONSTITUTIONAL LIMITATIONS ON THE SCOPE OF LEGISLATION

Decline in the Power of Legislatures — Special Legislation

Almost as important as the theory of co-ordinate powers of government is the American doctrine of constitutional limitations. Though on occasion it has appeared a bulwark of the former principle, it now promises to destroy it. The sovereign legislature of a century ago is only a shadow of its former self.[1]

American legislatures started with powers only a trifle smaller than those of the British Parliament. They were restrained only by a few provisions of the Federal constitution; they possessed original, not delegated, powers. Except as they were prohibited in the constitutions, the presumption of power to act was always conclusively in their favor. Technically this is the extent of their powers today, but by the multiplication of prohibitions and grants within the constitutions the powers of the legislatures have shrivelled.

Parliament in England exercised all the power of the people. During the period of the Revolution the legislature enjoyed a similar confidence in America, but by a steady process of attrition its powers have fallen

[1] The limitations of its powers discussed in this chapter do not refer to the technical form in which bills must be drafted, but cut down the substance of the legislative power beyond the degree to which it is limited in the usual Bill of Rights which is supposed to protect the "inalienable" or "natural" rights of man.

away. First, the adoption of the idea of separation of the powers already mentioned reduced the scope of its action and made it at most only *primus inter pares*. By written constitutions some legislative powers, few at first, but increasing in number and importance, slipped away by being prohibited to the legislature, reserved to the people or by passing to the advantage of the executive or the judiciary. The power to decide what was required by the constitution was assumed by the courts or specifically granted to them. Then the power to draw up the constitution passed from the legislature [1] to the convention, or to the convention acting subject to a popular referendum. Now power over the administration, especially with the increase in complexity of modern life, is passing from the legislature to the executive.

Not satisfied with transferring from the legislature to other bodies or departments of government much of its former power, we have stripped it of part of its ordinary legislative functions. In four ways this end has been accomplished: (1) We have by constitutional provisions forbidden legislatures to pass bills of certain sorts or on certain subjects. (2) We have through our constitutions passed a large amount of legislation which we have put beyond the power of the legislature to change, and since we choose to place the responsibility for such laws elsewhere than on the legislature, we have had to make it easier to convoke our constitution-making machinery. (3) We have provided in many states that certain sorts of laws shall go into effect only on popular

[1] The revolutionary constitutions except in South Carolina, Virginia and New Jersey were "put into force by bodies exercising general legislative power but which had direct authority from the people to form a constitution." See W. F. Dodd, Revision and Amendment of State Constitutions, 1910, Chap. I, *passim*.

vote, or in some states that the people may request a right to pass on the laws before they go into effect. (4) We have provided that the people may by the initiative propose laws in the final enactment of which the part of the legislature is incidental or non-existent.[1]

Restrictions of these various sorts have largely reduced the importance of our legislatures for general legislation. How far we shall go toward making our lawmaking bodies impotent no one can see. Indications now are that we have not yet come to the turn of the pendulum. Constitutional restrictions are still popular. The constitutional codes of Louisiana and Oklahoma serve as models rather than warnings to Arizona and New Mexico. The initiative and referendum too, though perhaps not in their extreme form adopted in Oregon, seem destined to play an increasing part in our law-making. Part of the development through which we are now going is doubtless explained by the character of the legislatures themselves. They have lost power because they have proved themselves unworthy of their trust. But it would have been too much to expect that the corrupting influences, which in a new country with

[1] The type of constitution which provides for laws without legislatures is found in Oregon, where an amendment of 1902 provides "The legislative authority of the state shall be vested in a legislative assembly . . . but the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative. . . . The second power is the referendum." This provision applies to both statutes and constitutional amendments.

Provisions similar to that in Oregon are found in Ark. 5, 1; Col. 5, 1; Mo. 4, 1; and in Montana 5, 1, applying only to laws.

great resources to exploit invade our economic life, should have been absent from our political bodies when they have favors of such great economic value within their grant. With the coming of more stable economic conditions, and a higher degree of education, we may come again to place greater power in the hands of our representatives.

The abolition or minimizing of the legislature through "legislation by the people" under the initiative and referendum is a palliative, not a cure, for the inadequacy of our lawmaking. Though we grant the incorruptibility of the people, though we grant that their motives are always fair, it must always remain true that no people can devote enough time to lawmaking to give any large number of laws a just consideration. That is difficult enough for our legislative bodies with their committee hearings and administrative bodies upon which they may call for reports. We must have a "due process" in legislation as well as in court trials. A law passed without notice to those to be affected and without giving them a chance to appear in their own defense stands in great danger of being unfair.

A judgment without notice and hearing is revolting to Anglo Saxon ideals of personal liberty, and though the passage of a law has not the technical character of a judgment it is nevertheless a determination of rights, So far as any legislating body fails to hear both sides, its acts fall short of the proper standard for law. A legislator must hear both sides before he votes. If the people are legislators, they can do so at best on but a few measures. It is only in unusual cases that both sides of a question can be presented to them. The referendum and initiative we may keep as extraordinary measures to be used under abnormal conditions, like munitions of war, but for a state of several million people

they can never become the sole or even the main reliance for legislation.

Our interests are too diverse to allow any plebiscite or indeed any set constitutional prohibition of action on any large class of cases to decide what shall and what shall not be law. We must give greater, not less, power into the hands of our lawmakers if the law is to do justice in the largest number of cases possible. With the growth of complex social relations, the harm which may be done by hasty legislation increases, but the harm which may be done by hard and fast rules which cut down the power of legal relief grows quite as rapidly. There are but few rules of universal application and our constitutions for that reason may in the future again become the "frames" which they were in some commonwealths a century ago.

Special Legislation

Chief among the constitutional limitations instrumental in cutting down the competence of the legislature have been the provisions forbidding special or local legislation, or requiring that laws be general or uniform in their operation. During the first half century of our national existence special legislation was passed with a few exceptions whenever the legislature judged it necessary. General restrictive provisions make their appearance in the Iowa constitution of 1846.[1] Certain subjects were specified, upon which no special or local legislation was to be passed, and then a general clause required that, "In all the cases above enumerated and

[1] Specific limitations have always been found in American constitutions in connection with the bills of rights. Some states too developed special sections limiting the legislature by specific provisions in the body of the constitution. See N. J. Const. 1844, sec. 7.

in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state."[1]

Provisions of this sort at once found acceptance in other states. They were adopted more rapidly in the revisions or amendments of constitutions in the northern states, but are now to be found in about the same proportion in both North and South. The clauses are not always so sweeping as those used in Iowa. One class stipulates that all general laws or laws of a public nature must be uniform in their operation throughout the state. This is, so to speak, an attack on special legislation from the rear. It is not prohibited directly, but a general law cannot be subject to exceptions.[2] A second class prohibits special, local or private laws in any case for which provision has been made,[3] or can be made,[4] by general law.

As a rule the general clauses such as those cited are supplemented by specific lists of subjects on which the injunction against the legislature is absolute. In some states the specific limitations are without the general clauses. The tendency seems to be to

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[1] Iowa Const. 1845, Art. 3, sec. 30.

[2] Ariz. T. Bill of Rights, 17; Cal. 1, 11; Fla. 3, 21; Ia. 1, 6; 3, 30; Kan. 2, 17; N. D. 11; Nev. 4, 20; Ohio, 2, 26; Okla. 5, 59; Wis. Amendment 4, 32.

[3] Cal. 4, 25; Col. 5, 25; Ill. 4, 22; Ind. 4, 23; Ky. 59; Md. 3, 33; Minn. 4, 33; Miss. 87; Mo. 4, 53; Mont. 5, 26; N. D. 69; Neb. 3, 15; Nev. 4, 21; Pa. 3, 7; S. C. 3, 34; S. D. 3, 23; Okla. 5, 46; Tex. 3, 56; Utah, 6, 26; W. Va. 6, 39; Wyo. 3, 27.

[4] Cal., Ill., Ky., Minn., Mo., Okla., Tex., Wyo., same clauses as in note preceding; S. C. 3, 34; Utah 1, 24; Kan. 2, 17; Ind. 4, 23; Wyo. 1, 34.

Peculiar restrictions requiring publication of notices referring to local laws and other qualifications are found in Ala. 105, 109; Ark. 5, 25; Va. 51, and Ga. 1, 4, 1.

increase their number and explicitness. More than any other single factor they help to swell the size of our constitutions.

In 1898 Louisiana adopted a constitution ninety-five pages long, which prohibits special legislation by the legislature through the device of incorporating much within itself. Alabama's [1] constitution of 1901 covers sixty-two pages. It contains almost one hundred sections of prohibitions on the legislature. There are thirty-one prohibitions under the caption of "local legislation." The restrictions range from important matters down to prohibition of special laws on divorces and "who shall be liners between precincts or between counties." Oklahoma's constitution of 1907 covers seventy-four pages and among other disabilities of the legislature are found prohibitions of special acts "declaring any named person of age," or "extending. . . . the duties of aldermen." Unusual, indeed, to find it necessary to keep the legal duties of the latter from becoming oppressive!

A digest of the various limitations is beyond the scope of this book. The branches most commonly subject to the prohibition are laws affecting land, including streets, highways, public squares and the like; regulations concerning swamps, ditches and fences; laws changing the law of descent, validating wills, legitimating children, changing names of persons or corporations, granting divorces, granting franchises, chartering ferries, dams or bridges, changing county seats, incorporating towns and regulating the assessment of taxes.

The varied nature of the prohibitions shows the wide-

[1] The comparisons here made are based on Thorpe's American Charters, Constitutions and Organic Laws.

spread character of the demand that the people be protected against the legislature, and also, curiously enough, that the legislature be protected against the importunities of the people, for the abuse involves both sides.

The regulation of special legislation is in fact one of the most serious problems of the modern legislature. Without it there is admittedly a wide field for favoritism toward certain individuals, and wasting of the time of the legislature in petty, private or local legislation. But no truly successful scheme has yet been devised by which the right extent of regulation can be secured. Often the adoption of restrictions has meant not a change in the character of the law, but a change in its form. In New Jersey, for example, a way to defeat the constitutional provisions on special legislation has been found, the possibilities of which are only beginning to be appreciated. The constitution provides, "The legislature shall not pass private, local or special laws in any of the following enumerated cases. . . . Laying out, opening, altering and working roads and highways. . . Regulating the internal affairs of towns and counties, appointing local officers or commissions to regulate municipal affairs. . . Creating, increasing or decreasing the . . . allowance of public officers during (their) term." . . These prohibitions are specific, but what is to be said if the act is general in form and its operation made conditional on the local adoption of its provisions by referendum vote? This subterfuge has become a frequent resource of those seeking privileges which if asked in a general law would not receive the approval of the legislature. Conditional acts in great number are passed relating to drainage, water supply of cities, roads, streets, parks, salaries of officials, municipal debt, taxation,

purchase of land, and a host of similar subjects. Legislation of this sort is clearly general only in form but special in fact.[1]

On the other hand, if the rule be made strict enough so that it cannot be evaded, there is danger that its generality will make the law too great a restraint where diversity ought to be allowed. The difficulty is, that in the last analysis the whole problem of special legislation is one of fact, not of law. Whether in any particular case, say in the granting of a city charter, a special law is justified, depends on the facts of the case, and no two cases are alike. Any regulation of special legislation by law can be at best only a rough approximation of a just rule. Yet the other alternative — giving the legislature a free hand — would have few advocates. Legislative debates and legislative committee hearings have not the impartiality which would induce the choice of either as a forum in which to determine whether the facts justified a special law. At root the problem of special legislation is a judicial problem, but one in which judgment is based on facts. It is not unlike the problem which confronts the courts in passing on the question of what is a fair rate on a public utility; the standard cannot be a fixed one, conditions must alter cases, and in the determination of the standard

[1] In some states holdings of the courts have been given to the effect that if a statute is plainly intended for a particular case and looks to no broader application in the future, it is special or local, and if the constitution forbids such laws it is unconstitutional, no matter if its form be general. For example, see *State ex rel. Mitchell*, 31 O. St. 592; *McCarthy* v. *Commonwealth*, 110 Pa. St. 243; *Hammer* v. *State*, 44 N. J. L. 667. But in spite of such rulings a law intended to defeat the provision can usually be drawn which will be unlimited as to time and so general *in form* that it will escape being held void.

the *facts* must be given quite as much attention as the law.[1]

Though there are, therefore, definite advantages to be reaped by keeping the freedom to pass special laws, there are important reasons why such legislation should as a rule be avoided. There are at least four grounds of objection.

First, because it is a fundamental principle of legislation that there should be but one rule for cases substantially similar. Discrimination between individuals or interests in the same position is unjust. Equality before the law, considered in its broadest sense, means freedom from class legislation, and though the Federal constitutional rights of due process and equal protection cannot be raised in special laws which, for example, change the names of persons or places, or regulate the rights to be enjoyed by certain corporations, it is evident that such acts are as a rule indefensible.

Secondly, special legislation tends not to stop at differences which are immaterial in character. The tendency is, when legislative favors involve economic advantage, for discriminations to creep in which accentuate factional interests which would lie undeveloped if the same rights and duties were upon all alike.

Thirdly, not only is the average special law bad in principle but it is a means of padding the statutes without reason. Corporate charters may cover scores of pages. Most if not all the privileges that *should* be granted can be granted under general law. The special charter is of interest primarily only to those who are to work under it. There is no reason why it should be

[1] For a discussion showing the disadvantages of too strict a prohibition in Pennsylvania, see Penna. Bar Asso. Rept. 1899, p. 212 *et seq.* and 134 *et seq.*

spread at length upon the statutes to make the important part of the law more difficult to get at and to increase the printing costs, when a filing of the charter with some administrative official, who shall see that it conforms to the demands of a general statute on the subject and keep it open to the use of the people, protects the public interest as well. The legislature as a whole should be freed from the waste of energy which occurs if a flood of private bills is allowed to distract attention and waste time. Attention should be concentrated on measures that involve policy rather than "politics" — a condition impossible if the activities of the legislature are individualized by a thousand private bills.

Finally, the reflex action of a large number of special bills upon the legislature is pernicious. Where favors are to be granted those seeking favors will flock. If special legislation is allowed free reign every interest which can profit by the abrogation of the general rule will have its agents at the legislative session either upon the floor or in the corridors. Conversely, if special legislation is thus sought, the inducement is increased for the unprincipled members of the legislature to organize to see that special laws are not granted for less than their value. The closest ally of the lobbyist is the special law, and there is no influence which can push both him and the legislator toward questionable action so surely as this.

None of these objections necessitates a constitutional prohibition of this sort of law, though that has come to be a characteristic heroic American remedy. Even where freedom of action is allowed, no legislature can be too circumspect in its use of the valuable but dangerous privilege of passing special laws. General laws or rigidly enforced rules of the legislature may be found

sufficient to check the pressure for special legislation. The public opinion which can only be aroused to put a prohibition in a constitution is of much less value than that which prescribes a rule which the legislature feels bound to obey not only in letter but in spirit. The one may frequently, as our experience proves, be defeated by a skillful subterfuge, the other is one which not even the interests of the legislators will allow them to disobey.

But we need not rely on theory alone for arguments against the free use of special legislation. The legislatures in states where there are no restrictions too often run riot in special laws to justify the assumption that the cutting down of power is at present without good reason. The worst offender in this respect is North Carolina. In 1866 the public and private laws passed covered together about three hundred pages, equally divided between the two sections. In the session of 1909 the public laws had increased in bulk for the single session to a volume of 1369 pages — no distinction being made in publication between special and local acts and those of general application. Private laws of the same session covered nine hundred and twenty-eight pages. In the next session, 1911, the abuse appears in full flower. Public local laws are published in a separate volume of one thousand two hundred and sixty-five pages, and the private laws demand another of one thousand and eighty-eight pages. How flagrant the abuse of local legislation has become is illustrated by the following titles copied verbatim: From the first two pages of captions of the public local laws of 1911, acts are found "appointing C. H. Harris and J. W. Robbins justices of the peace for Rock Mount Township in Nash County," "to prohibit the sale of malt, near-beer and beerine in Macon county," "to increase the

compensation of the court stenographer of Pitt County," "to establish the division line between two special tax school districts in Richland Township, Beaufort County," "relative to cotton ware of Stanly County and the town of Albemarle," "providing that four and one-half feet shall be a lawful fence in Perquimans County," "providing a squirrel law in Perquimans County," "relating to the drainage of lands in Indian Creek," "relating to dogs in Granville County," "to increase and regulate the pay of jurors and venire men in Stanly County."

Other acts provide rules "to prevent depredation" by "turkeys, geese, ducks and chickens" in Catawba and Guilford Counties, deal with "the relief of Miss Lassie Kelly" and the abuse of "throwing sawdust in Big Ivey Creek in Buncombe County." One aims "to prevent loud and profane or obscene language, . . . or being drunk, upon the highways," another makes disorderly conduct a misdemeanor in the village of Delgado." "The sale or giving away malt liquors, near-beer and other beverages containing alcohol within one mile of Knight's Chapel Baptist Church," or within three miles of the Missionary Baptist Church at Lawrence's Crossroads, or "near Darl's Chapel Freewill Baptist Church," is prohibited, as is "the shooting of fire crackers . . . within a radius of one mile of the post office at Haw River." Separate schools must be established for the Croatan Indians, a law alleged to be passed that the blood of Virginia Dare be not sullied by association with negroes.

In game laws everywhere there is temptation to resort to local legislation but in no state apparently is the pressure so great as in North Carolina. In the last decade about one thousand laws have been passed in the various states on this subject. Over one-third of

these are found in North Carolina. A circular issued by the United States Department of Agriculture shows twenty-nine different seasons for the hunting of deer in force in the counties and townships of the state; with a wide profusion of rules applying to almost a score of other varieties of game. Often the rules are subject to exceptions for certain townships even in the counties to which they apply.[1]

Maryland also, in this respect, furnishes an example to be avoided. There the constitutional requirement that a general law shall be used where it can cover the case is held directory to the legislature merely. The result is a flood of acts similar to those noted in North Carolina, including, in 1904, special charters granted to men who did not intend to use them but held them for sale to others. In 1902 one bill passed but vetoed, was to allow a certain Mr. Quill to register in a district where he did not reside. The oyster legislation of the state is also notorious, each member within his district having a free hand as to the law for his constituents.[2] When we reach this condition we have arrived at a point where each member in fact claims a veto on measures affecting his locality. The legislature *de facto* becomes merely the register of what local opinion or the controlling group of interests in each district demands, and the consideration of the general interests of the state at large is swamped by the demands of the localities.

There is evidence that conditions such as these have been markedly improved by the adoption of

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[1] Poster No. 23, Oct. 3, 1910, U. S. Dept. of Agriculture, Biological Survey.

[2] See an excellent discussion by Oscar Leser in Maryland Bar Ass'n Report, 1904, p. 160.

constitutional limitations. Private Laws in Illinois in 1869 covered 3,354 pages. Constitutional limitations were introduced in 1870. The average amount of such legislation, for the five legislatures succeeding the readjustment to the new constitution, was 228 pages. For ten years previous to the adoption of the constitution of 1873 in Pennsylvania, the average total of all legislation in annual sessions was 1,131 pages; for the ten years following that date, 294 pages, though the legislature met only *biennially*.

In Virginia in the session of 1899–1900 the laws covered 1,421 pages, including almost five hundred bills pensioning Confederate soldiers, as to which the editor of the law significantly remarks, "In several instances two acts were passed giving a pension to the same person."[1] A new constitution containing increased constitutional limitations went into effect in 1902.[2] Pension legislation at once fell to six acts, one of general application, which has practically removed this item from subsequent lawmaking. In the session of 1904, the first normal one under the new constitution, the total legislation covered 378 pages.

Our conclusion is, that the power to pass special laws is one which, rightly exercised, is a valuable right of the legislature. To deny the power in broad terms places a mould around the law which denies justice to particular interests and sets a negative standard of legislation which in a complex and growing society may be quite as harmful as the unjust laws the limitations were intended to prevent.

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[1] Acts of Assembly, Virginia, 1899–1900, p. 1477.

[2] The legislation passed by the first session under the new constitution covered 1009 pages, but is explained by the necessity of adjustment to new conditions.

American experience, reflected in the constitutions, has convinced our people that this danger is less than that incurred by giving the legislature a free hand. The example of the states which lack restrictions of this sort enforces this conviction.[1] For the present at least, constitutional limitations on special legislation are an important and growing part of our fundamental laws. Though they are admittedly subject to serious objection in theory, there can be no doubt that they have been a valuable protection under the conditions which have heretofore surrounded the American legislature. Whether in the future the new problems of legislation, constantly becoming more complex and necessitating finer adjustment of law to varying needs, will not bring about a partial abandonment of their use is at least an open question.

[1] A partial exception is furnished by the New England States.

CHAPTER III

CONSTITUTIONAL LIMITATIONS ON THE FORM OF LEGISLATION

Not all limitations which the constitutions place upon the legislatures cut down the power to pass bills. Restrictions exist in large number which are not aimed at the control of the content of legislation or the contingencies upon which it will, after passage by the legislature, be given the force of law. They do not prescribe rules which, because of their generality, make it impossible for the legislature to bend the law to suit peculiar cases. On the contrary they prescribe that, though the will of the legislature is to be left free as to what it will do, it is to be controlled as to the form in which it may give expression to its will. Rules of this nature are, of course, limitations of legislative power, but limitations of a kind radically different from those discussed in the last chapter. They are in most cases rules that would be observed as a matter of course under normal conditions. In all but exceptional cases it is only when influences control which would use the legislature for private or illegitimate ends, or introduce a manner of legislation whose course is not easy to follow, that the restraint will be felt.

Constitutional Provisions Requiring Unity of Subject

Among such limitations the most common is the requirement that each bill contain but one subject.[1]

[1] Ala. 45; Cal. 4, 24; Col. 5, 21; Del. 2, 16; Fla. 3, 16; Ga. 3, 7, 8; Ida. 3, 16; Ill. 4, 13; Ind. 4, 19; Ia. 3, 29; Kan. 2, 16; Ky. 51;

A few states make an exception in the case of general appropriation bills.[1] In New York and Wisconsin the provision applies only to private and local bills.[2]

Like the original requirements as to title, indeed like constitutional limitations in general, this rule is an attempt to remedy an abuse. It seems to have first appeared in the New Jersey constitution of 1844. The preamble declares its object to be, "To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other." New York in 1846 and Wisconsin in 1848 adopted the rule, though limiting its application. Indiana in 1851 adopted an elaborated form, which served as a model for many states:

"Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title, but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." (Art. III, sec. 19; 1851.)

At present the inclusion of "matters properly connected" with "the subject of a bill" is allowed by the constitutions of Florida, Idaho, Iowa, Nevada and

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La. 31; Md. 3, 29; Mich. 4, 20; Minn. 4, 27; Mo. 4, 28; Mont. 5, 23; N. D. 61; Neb. 3, 11; Nev. 4, 17; N. J. 4, 7, 4; O. 2, 16; Okla. 5, 57; Ore. 4, 20; Pa. 3, 3; S. C. 3, 17; S. D. 3, 21; Tenn. 2, 17; Tex. 3, 35; Utah, 6, 23; Va. 52; Wash. 2, 19; W. Va. 6, 30; Wyo. 3, 24. The application of this rule to the title requirements is discussed later.

[1] Ala., Col., Del., Mo., Mont., Okla., Pa., Tex., Utah, Wyo. In some states it does not apply to general revisions or consolidations of laws, and in states where the question has arisen the same freedom has been allowed, though there was no exception stated in the constitution.

[2] N. Y. 3, 16; Wis. 4, 18.

Oregon.[1] The value of this clause is doubtful. It is questionable whether the original provision would not include all that ought properly to be connected with a single subject.

The latter part of the above rule as found in Indiana is found in the constitutions of California, Colorado, Idaho, Illinois, Iowa, Montana, North Dakota, Oregon, Texas, West Virginia and Wyoming.[2] The abuses possible under such a constitutional rule are noted under the limitations as to title. When a law which offends this provision comes before the courts, it raises two questions, which are almost without exception difficult and often impossible to answer satisfactorily. First, is the part which goes beyond the title separable? It is often doubtful whether the law which remains will not be crippled or at least weak without the part which must be struck down. Second, did the objectionable part, even if detachable, act as an inducement to the passage of the act; would the legislature have passed the part covered by the title if it had not been joined with that which is not? There is no way to get a correct answer to this question. The courts have often assumed that the act, so far as within the constitutional restriction, should stand if there appears to have been no corrupt influence in its passage, but such a rule only places the greater premium on corruption which is so subtile as not to be detectable.[3]

[1] Fla. 3, 16 (1885); Idaho 3, 16 (1889); Iowa 3, 29 (1857), (identical with the Indiana provision); Nevada 4, 17 (1864); Oregon 4, 20 (1857), (identical with Indiana).

[2] Cal. 4, 24; Col. 5, 21; Ida. 3, 16; Ill. 4, 13; Ia. 3, 29; Mont. 5, 23; N. D. 61; Ore. 4, 20; Tex. 3, 35; W. Va. 6, 30, and Wyo. 3, 24. The clauses in Ala. 45; Mo. 4, 28; Mont. 5, 23; Tex. 3, 35; and Wyo. 3, 24, present additional variations.

[3] A peculiar provision of the constitution of Tennessee should be

The whole field of unity of subject is one in which the courts have arrived at no definite rules. What is one subject? A latitudinarian interpretation could destroy the force of the limitation. On the other hand, a strict construction would force the legislature into piecemeal lawmaking which it was certainly not the object of those who made the constitutions to demand. As a rule the courts lean toward the former rather than the latter alternative. No technical, artificial distinctions will be allowed to upset the legislation. Some courts show a tendency to differentiate certain classes of cases to which they will hold that the provision applies, though the wisdom of this judicial classification has been severely criticized.

Several sorts of combinations of subjects have been almost uniformly held to conflict with the constitutional requirements. The courts look with especial disfavor upon laws which combine civil and criminal penalties under one title. Local laws, where they are not forbidden as such under the constitution, are apt to be held to offend the unity of subject rule if they refer to more than one subject, and the same is apt to be true of special laws affecting more than one person or corporation.[1]

In general, it may be said that the greatest care should be used when drafting laws under provisions of this sort to avoid putting unusual combinations in the same law even though a title broad enough to cover both be

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noted. It reads, "No bill shall become a law which embraces more than one subject." (2, 17, 1870.) Apparently, under this clause, the courts would not have the question of partial invalidity raised, but the bill remains a bill and the process of enactment never becomes complete.

[1] Specific prohibitions of the latter sort are found in Ala. Const. 1901, 104; Pa. Const. 1873, 16, 10; S. D. Const. 1889, 17, 9.

chosen. Local custom may have been recognized by the courts so that an act containing various matters may be drawn, affecting, for example, a city, and be safely covered by such a title as "An act concerning the powers of the city of . . ." But such a practice always subjects the law to the danger of being held void, at least in part, because of some unnoticed provision. In doubtful cases it is always safer to put the subject-matter into two acts.

Even where there is no constitutional rule requiring unity of subject that standard should be adopted. Good practice will dictate that laws should be drafted in a way which will make of each act a clear-cut proposition which, when it comes before the legislature, will be above the suspicion of log-rolling and will be free from the complexities which encourage difference of opinion and therefore endanger the chance of passing the bill. Furthermore, a law with one subject enables the layman, the practitioner and those who compile or codify the statutes more easily to fit the new act into the laws already on the books. There are very few instances in which the unity of subject rule reasonably interpreted is a real hindrance to legislation which would otherwise be unobjectionable.

With limitations requiring unity of subject may be mentioned those found in Idaho, Indiana and Oregon, requiring that every act be plainly worded, avoiding as far as possible the use of technical terms.[1] Such provisions can hardly be more than directory.

Constitutional Restrictions Affecting the Money Power

Control of the purse strings has always been a right jealously guarded in Anglo-Saxon countries. It is

[1] Ida. 3, 17; Ind, 4, 20; Ore. 4, 21.

perhaps not to be wondered at that provisions guarding the power to appropriate money and raise it by taxation or borrowing, is subject to regulation in the constitutions of practically all our states.[1] Our constitutional provisions differ from those in England, however, in that the English fought to keep the control of the money power in the hands of the legislature as opposed to the executive. In America the object has been to protect the rights of the people from abuse by their own representatives in the legislature. Of these restrictions a large number limit the power of the legislature by forbidding financial legislation of certain kinds; others leave the scope of the power but regulate the form of its exercise. Appropriations are oftenest subject to regulation. There is a widespread distrust of indefinite leave to draw on the treasury, and fear that the appropriation bills may be made "pork barrels" by having grafted on them expenditures which but for "log-rolling" could not stand alone. The motive back of these rules is largely the same which dictates the one-subject-in-title standard. Appropriations, therefore, must in many states be for a specified purpose [2] and contain provisions on no other subject.[3] In some states only one item or subject may be included.[4]

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[1] The limitations here discussed refer to the form in which this class of bills must be drawn, not to constitutional debt limits.

[2] Ark. 5, 29; Cal. 4, 34; Ill. 5, 16; Kan. 2, 24; La. 56; Md. 3, 32; Mo. 10, 19; Mont. 12, 10; N. Y. 3, 21; Ohio 2, 22; Okla. 5, 55; S. C. 4, 23; Tex. 8, 6; Wash. 8, 4.

[3] Ala. 4, 71; Fla. 3, 30; Ga. 3, 7, 9; La. 55; Miss. 69; Okla. 5, 56; Pa. 3, 15; S. D. 12, 2. Applies in Del. to all bills raising revenue and in some states only to certain classes of appropriation bills. Ill. 4, 16; Neb. 3, 19; Ore. 9, 7; W. Va. 6, 42.

[4] Ala. 4, 71; Ark. 5, 30; Cal. 4, 34; Col. 5, 32; Ga. 3, 7, 9; La. 55; Miss. 69; Mont. 5, 33; Pa. 3, 15; N. D. 62; S. D. 12, 2; Wyo.

The general appropriation bills, being a necessity for the carrying on of the state government, are specially liable to become "pork barrels" unless some constitutional restriction limits the possibility of "log-rolling" methods. Of course, even within the terms of the provisions about to be cited, there is opportunity for questionable practice, but taken with the requirements for unity of subject there is no doubt that these constitutional limitations have greatly lessened the abuse.

In some states, general appropriation acts may contain only appropriations for the ordinary expenses of legislature, executive and judiciary,[1] or the "general expenses of the government."[2] In a few, items may be included for such charges as the interest on the public debt,[3] for the sinking fund,[4] for institutions under the exclusive control of the state,[5] the state charitable institutions[6] and the public schools.[7]

In some states, special enumeration is made of certain purposes, such as the payment of the legislature or "civil list,"[8] the payment of state officers,[9] or cost of

3, 33. There are peculiar additional requirements not elsewhere mentioned in La. (55), N. Y. (3. 21), Miss. (64).

[1] Ala. 4, 71; Ark. 5, 30; Col. 5, 32; Ga. 3, 7, 9; Miss. 69; Mont. 5, 33; N. D. 62; Pa. 3, 15; S. D. 12, 2; Wyo. 3, 24.

[2] Cal. 4, 29; La. 55; Neb. 3, 19; Ore. 9, 7.

[3] Ala. 4, 71; Col. 5, 32; Ga. 3, 7, 9; La. 55; Miss. 69; Mo. 4, 43; Mont. 5, 33; N. D. 62; Pa. 3, 15; S. D. 12, 2; Tex. 3, 35; Wyo. 3, 34.

[4] Mo. 4, 43.

[5] Col. 5, 32; Ga. 3, 7, 9.

[6] Mo. 4, 43; La. 55.

[7] Ala. 4, 71; Cal. 5, 32; Ga. 3, 79; La. 55; Miss. 69; Mo. 4, 43; Mont. 5, 33; N. D. 62; Pa. 3, 15; S. D. 12, 2; Wyo. 3, 34.

[8] Mo. 4, 43.

[9] Ill. 4, 16; Neb. 3, 22; Ore. 9, 7; W. Va. 6, 42.

collecting the revenue.[1] In one state general appropriations must be made before any others.[2]

Tax laws are subject to similar regulations. In some states they must be specific, stating distinctly the object of the tax, to which alone it may be applied.[3]

As a co-ordinate development with the provisions cited has grown the rule that the power to create state debt must be exercised in bills of a certain form. In eighteen states the purpose for which the money is borrowed must be stated [4] and the money can be used for no other purpose.[5]

The provisions concerning the form of bills creating state debt are often long and complicated. They are seldom used and are cited but not digested here. They vary in form from the elaborate provision of Missouri to the simple declaration found in Pennsylvania: "All laws authorizing the borrowing of money by and in behalf of the state shall specify the purpose for which the money is to be used; and the money so borrowed shall be used for the purpose specified, and no other." [6]

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[1] Mo. 4, 43.

[2] Mo. 4, 43.

[3] Ark. 16, 11; Iowa 7, 7; Kan. 11, 4; Ky. 180; Mich. 14, 14; N. C. 5, 7; N. D. 175; N. Y. 3, 24; Ohio 12, 5; Okla. 10, 19; Ore. 9, 3; S. C. 10, 3; S. D. 11, 8; Va. 50; Wash. 7, 5; Wyo. 15, 13.

[4] Cal. 16, 1; Col. 11, 4; Del. 8, 3; Ga. 7, 4, 1; Idaho 8, 1; Iowa 7, 5; Kan. 11, 5; Ky. 178; Minn. 9, 5; Mont. 13, 2; N. J. 4, 6, 4; N. Y. 7, 4; Nev. 9, 3; N. D. 182; Okla. 10, 16; Pa. 9, 5; Wash. 8, 3; Wis. 8. 6.

[5] Cal. 16, 1; Col. 11, 4; Del. 8, 3; Ga. 7, 4, 1; Idaho 8, 1; Iowa 7, 5; Ky. 178; Md. 3, 24. Special provisions: Minn. 9, 5; Mont. 13, 3; N. Y. 7, 4; N. D. 182; Okla. 10, 26; Pa. 9, 5; Wash. 8, 3; Wis. 8, 6. Applies only to loans to repel invasion: Kan. 10, 4.

[6] Pa. 9, 5 (1873). See also, Ga. 7, 4, 1 (1877).

Constitutional Restrictions on Local and Special Laws

Local and special legislation have also had restrictions of form thrown around them in eight states,[1] intended to prevent the pushing through of local or special laws without notice to those to be affected. It is provided in more or less detail, which in some cases may be increased by provision of law, that the localities or persons to be affected by the law shall have notice a certain length of time before the measure is introduced or passed.

The phraseology used is practically uniform in the different states. The Pennsylvania provision of 1873 reads: "No local or special bill shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or the thing to be affected may be situated, which notice shall be at least thirty days prior to the introduction into the general assembly of such bill and in the manner to be provided by law; the evidence of such notice having been published shall be exhibited in the General Assembly before such act shall be passed."

Generally this regulation of the form of special or local legislation is joined to, or follows, provisions limiting the scope of the power to pass special legislation. The later forms paraphrase the Pennsylvania model, sometimes adding that the publication must "state the substance of the contemplated law"[2] or be made in the same manner as advertisement of judicial sales,[3] or that the fact of publication must be recited in the bill.[4] There

[1] Ark. 5, 26 (1874); Fla. 3, 21 (1885); Ga. 7, 16 (1877); La. 50 (1898); Mo. 4, 54 (1875); N. C. 2, 12 (1876); Pa. 3, 8 (1873); Tex. 3, 57 (1876).

[2] Mo., La., Tex.

[3] La. 1898.

[4] Mo., La. In Florida the notice must be given sixty days before introduction of the bill.

is no better example of the close connection between the form and the substance of legislation than is furnished by these provisions.

Direct limitations on the power to pass special legislation have been largely introduced into our constitutions, as is shown elsewhere. When broad in terms they are subject to serious objections, because they destroy the flexibility of the law. The adoption of a constitutional provision as to form of legislation similar to those now under consideration meets much the same purpose without the disadvantages attendant on wholesale prohibition. In other words, regulation of form of legislation makes less necessary, perhaps even unnecessary as to some classes of laws, the regulation of the subject-matter.

If a publicity provision is broadened by the law to an extent that will insure real publicity and is enforced, there is less chance that class interests can secure unfair legislation in their favor or find it directed against them. Of course how much could be accomplished in this way depends upon the degree to which the constitution or the law supplementing it secures real publicity. A single appearance in small type in an out-of-the-way corner of a county paper might pass unnoticed and in practice defeat the object of publication. For lesser matters, such as the changing of names of persons and places, the convenience of the legislature itself should prove a sufficient guarantee that laws of general application will be passed.

Further, the efficiency of any of these checks depends after all, to a large extent, upon the spirit in which they are regarded. If the legislature is indisposed to observe the standards which the limitations suggest, it will in many cases find a way to avoid them. The history of our constitutional limitations is full of examples of

the observance of the letter of the rule to the sacrifice of its spirit.

Constitutional Restrictions Affecting the Enactment, Revival or Extension of Laws by Reference

The evils aimed at in the prohibitions of legislation by reference are not as a rule those which the interests of the members would lead them to tolerate, but those which arise from a lack of publicity in the law. It is impossible, or at least difficult, for the member himself to know what is actually to become law if he is asked to vote on an act which merely refers to the laws in the same field in another state or country, or even applies to the case in hand the same penalties or remedies as apply in the local law in some case already covered by the statutes. The Court of Appeals of New York gives as the reason for the clause in that state: "The evil in view in adopting this provision of the constitution, was the incorporating into acts of the legislature by reference to other statutes, of clauses and provisions of which the legislators might be ignorant, and which, affecting public or private interests in a manner and to an extent not disclosed upon the face of the act, a bill might become a law, which would not receive the sanction of the legislature if fully understood."[1] But the evil does not stop there, for such acts make the law practically inaccessible to those whose rights are affected. The practice increases the complexity of our already too complex legislation and, by rendering rights uncertain or insecure, destroys respect for the law. It is true that making laws by reference often saves time and energy to the legislator, but it only increases the time and energy which those who must obey the law must spend to find out

[1] *People* v. *Banks*, 67 N. Y. 568, 575–6 (1876).

what it means. No easier way is found also for the entrance of unexpected "jokers," introduced by those who use the legislature for their own ends, than the use of legislation by reference.

On the other hand, complete prohibition of this practice will in some cases pad the statute books with unnecessary repetitions. When, for example, the reference is to an established method of procedure, there is no reason why an adoption by reference is objectionable, and modifications of the rule have been recognized as a necessity by the courts of some states.

The New York Court of Appeals declares: "There is no evil . . . to be apprehended by the mere reference to other acts and statutes for the forms of process and procedure for giving effect to a statute otherwise perfect and complete," [1] and the Supreme Court of New Jersey says that, "an act of the legislature which is complete and perfect in itself — the purpose, meaning and full scope of which is apparent on its face — is valid though it may provide for actions or means for carrying its provisions into effect by reference to a course of procedure established by other acts of the legislature; and that an act which in itself is a complete and perfect act of legislation may provide for ancillary proceedings to accomplish the purposes expressed in the act by a reference to general laws on the subject without violating the constitutional provision." [2]

The constitutional provisions here, as in many other cases touching the form of laws, do not measure the actual degree of restraint. Limitations of laws on this point are of frequent occurrence in the rules of the various houses. They there set a flexible standard by which

[1] *People* v. *Banks*, 67 N. Y. 568, 576 (1876).

[2] *Christie* v. *Bayonne*, 48 N. J. L. Rep. 407, 409 (1886).

the rule can be adjusted as necessity arises, without relying on the courts to modify by interpretation the language of the constitution.

The broadest constitutional provision relating to legislation by reference is that found in the constitution of Louisiana. The English common law has there been adopted by general reference to such an extent that some prohibition of its further infiltration was thought necessary. Besides a prohibition against the reviving or amending of laws by reference it is provided that: "The general assembly shall never adopt any system or code of laws by general reference to such system or code of laws, but in all cases shall recite at length the several provisions of the laws it may enact.[1] The more common provision is similar to the specific provision in Louisiana which reads: "No law shall be revived or amended by references to its title, but in such cases the act revived or section as amended shall be re-enacted and published at length."[2] Similar provisions are found in about one-third of the states.[3]

These clauses are often joined with the similar rules prohibiting amendment or revision by reference, which are discussed under amendments. The courts have been liberal in construing these provisions. The prohibitions have been kept within the intent of the framers, but not always within the strict letter of the law.[4]

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[1] La. 33 (1898).

[2] La. 32 (1898).

[3] Ark. 5, 23; Col. 5, 24; Ill. 4, 13; Kan. 2, 16; La. 32; Md. 3, 29; Ohio 2, 16; Okla. 5, 57; Pa. 3, 6; Tex. 3, 36; Va. 52; W. Va. 6, 30: There are peculiar wordings in New York 3, 17, and New Jersey 4, 7, 4.

[4] See, for example, *In re Buffalo Traction Co.*, 49 N. Y. S. 1052 (1898); *People* v. *McKay*, 76 N. Y. S. 600 (1902); *Kennedy* v. *Borough of Belmar*, 38 A. 756 (New Jersey 1897).

Where there are no limitations on adoption of statutes by reference, the checking of abuses must rest on the rules of the legislatures and the integrity of the members alone, for the accepted doctrine is that the legislature has power to adopt any statute except as prohibited by the constitution.[1] A striking example of what may *not* be done under these provisions is shown in a recent Pennsylvania case.[2]

A merchant had sold in less than the original package certain "evaporated peaches" treated with sulphur dioxide, a substance harmful to health. A state law of 1895 had forbidden the sale of any food treated with substances injurious to health. In 1906 Congress had passed a pure food act regulating the subject so far as it was within the field of national legislation. The use of a certain amount of sulphur dioxide was permitted. In 1907 the former state act was repealed and a new one put in its place which continued most of the former provisions but declared no actions should be sustained when the foodstuffs were "not adulterated within the meaning of the provisions of the 'Food and Drugs Act' of June 30, 1906, enacted by the Senate and House of Representatives of the United States . . . and the rules and regulations promulgated from time to time for the enforcement of the same." The peaches, in the case before the court, were not adulterated to an extent sufficient to bring them within the prohibition of the Federal act. The question raised by the state was, could the state legislature adopt the provisions of a Federal act, as was attempted in the law, in spite of the state constitutional provision against extending laws

[1] *Atty. Gen.* v. *State Board of Assessors*, 106 N. W. 698 (Mich. 1906).

[2] *Commonwealth* v. *Dougherty*, 39 Pa. Superior Court 338 (1909).

by reference. The court held this could not be done. "Our legislature could not introduce into a statute . . . an act of Congress by a mere reference to its title. Much less could it inject bodily into the same statute all of the rules and regulations that might be from time to time promulgated." [1]

[1] Case cited, p. 345.

II

The Drafting of Bills

CHAPTER IV

TITLES OF BILLS

As the complexity of legislation has increased it has become essential to introduce many formal requirements which were unnecessary or unimportant when the work of the elective chambers was chiefly the granting of supplies. Regulation of public powers and the relations of man to man are difficult problems and demand new machinery for their solution. Some of the changes introduced refer to parliamentary procedure only, others to the form in which the subject-matter of the law must be arranged. In both cases the practice of American legislatures has been adopted from the mother country, England.

Custom had developed the use of certain forms for bills in Parliament long before the settlement of America, though the failure to observe the requirements or the inaccuracy of the drafting of bills was never enough to upset validity. Even today this is the case. When the sovereign power speaks it is unnecessary to inquire whether the command is given in the customary way, and failure so to do can never bring the bill into court.

American practice has developed far from this standard. In no case is the contrast stronger than in the rules in England and America relating to the titles of bills. Custom and law in England have made bills there conform to the same standard striven for in America — in fact the English practice of employing a special parliamentary officer to have charge of the form of all bills has given an effective guarantee that the

rules, including those as to title, will be observed. But there the safeguard of the form of bills is always custom or statute law not binding on the legislature. In America the form of bills has not only been regulated by custom and statute but has also been crystallized into most of our constitutions.

Originally titles were of little value. They developed from the general caption given to all the acts passed in the session. Distinct titles were introduced for each chapter in the first year of the reign of Henry VIII, though the modern form of act dates from the reign of Henry VI.[1]

So long as legislation was carried on in the form of petition to the king, who could grant the request or not as he pleased, the title served no purpose but to acquaint the executive with the purport of the petition. Titles and preambles fulfilled the same function; they gave explanations or apologies for what followed, and they were of use in fixing the attention of the executive or the citizen who read the law after its enactment rather than the attention of the legislature, on the content of the petition or bill. Even when the measures were brought before the legislature whether put in form by the king or parliament, the title was unimportant, for the three readings through which each bill went, and the numerous other stages — at one time over a score in all — through which bills were required to pass, insured that the contents would be brought to the attention of the lawmaker. The bill was read to the legislators instead of being printed to be personally read by them. Whether the presumption that they would all know the contents because the clerk laboriously read the measure aloud on three separate occasions, was justified, may be

[1] See discussion in *Ex parte Liddell*, 93 Cal. p. 633 (1892).

subject to doubt. It was assuredly a better method than putting written or printed copies in the hands of the members would have been at that time, for illiteracy was no disgrace and many of even those who could read would find it a much easier task to listen than to spell through the clumsy wording of a law.[1] Then too the bills were fewer in number, the questions were easier to comprehend and required less complex phrasing than now, though the framers of ancient petitions often seem to have done their best to overcome this advantage. The reading of the bill was the only way the member had of becoming acquainted with its contents, and though his lack of attention often left much to be desired, the fact that the bill was read made it unimportant whether the title was exact or whether the bill had any title at all.

The same indifference continued after the bills had come to be printed and after the reading of the bills, which actually took place in the assembly, had degenerated into a perfunctory reading of the title by the clerk to satisfy the rules of parliament. The theory was, that since the bills were printed and at the hand of the member, he must be presumed to know their content, just as he was when the bills were read in open session. The presumption was probably contrary to fact in both cases, but it became especially so when, with the growth of larger governmental problems, the number, length and complexity of bills increased. The member seldom read the bills unless the titles indicated a subject in which he was interested and he paid no attention when they were read by title during the sessions.

[1] The presumption that the people will read the printed law seems to be acted on in the Oregon direct legislation provisions. At least it is held that the title requirements of the constitution apply to bills before the legislature, but do not apply to those cited for popular vote. *State* v. *Langworthy*, 55 Ore. 303 (1910).

The result was a complete change in the importance of the heading itself. It had before been so unimportant that it was considered almost axiomatic that "the title is no part of the bill." Technically it continued to be merely a label or handle for recognizing or manipulating the measure to which it was attached during its consideration by the legislature. Its terms could not widen the statute nor restrain any of its provisions. Even at the present time the title, though its importance has increased, is not a part of the bill in the same way that the substantive clauses, the body of the bill, are parts of the bill. It does not command. Nor is it a part of the bill equal to the formal clauses creating the new law, repealing old law or fixing the date for the statute to go into effect. Though these clauses do not accompany the law into the statute they do have a constructive function, though only a temporary one. The title, on the other hand, is only an index of the contents of the bill; it does not create, repeal or put a law into effect — it merely stands as a sentinel to arouse the legislator's attention.

But though the title is a passive factor its importance in the bill is great. In practice it is the only means used by the legislator to determine whether he is interested in the subject-matter or not. He relies on the general debate of the open session or on party caucuses, or conversation with his friends in the legislature, to put him in touch with the principle involved. Under such conditions it becomes of the greatest importance that the title should be accurate. Otherwise a harmless-looking title may cover a vicious bill; it may be made the sheep's clothing for a legislative wolf. Abuses of this sort existed long before any effective remedy was devised. In England the problem was solved by the development of parliamentary responsibility which placed in the hands

of the cabinet the control over all important bills. Latterly too, the cabinet has provided for itself a body of experts who, under the direction of a skilled draftsman, see to it that the form of bills is correct. As the life of the government depends upon the fate of its measures the chance that any misleading title will be used, which on discovery would result in discrediting the cabinet, is reduced to a minimum.

In America, even before this English solution had been perfected, the use of written constitutions suggested the insertion of requirements which would be enforced by the courts. This would make it to the interest of every member who introduced a bill to have its title fit the rules of the constitution, because otherwise it would eventually be declared unconstitutional.

Origin of Title Requirements in America

An example of the sort of abuse prevalent before the titles of acts were regulated by constitutional provision is the famous Yazoo act of January 17, 1795. The title given was, "an act for the payment of the late state troops," and a declaration of the right of the state to all its unappropriated territory "for the protection and support of its frontier settlements." The measure was smuggled through by skillful lobbying and was then found to confer on certain men, their associates, heirs and assigns, an immense area of territory in fee simple. The fraud aroused great popular indignation, once its nature became known, and the next legislature passed a law annulling the grant. It is tradition that the public resentment provoked by the Yazoo act was the cause of the introduction by General James Jackson of the first clause of an American constitution regulating the titles of acts. The constitution of Georgia of 1798 declared, "nor shall any law or ordinance pass containing any

matter different from what is expressed in the title thereof." [1]

This provision at least prevented the making of bad bills under good titles, and the example it set was taken up by other states. Another principle soon came to be commonly joined with it — that there should be but one subject treated in each bill. With such a guarantee the practice of "log-rolling" is made more difficult, for, except when the measures combined refer to a single subject which can be put in the title, each of the bills must go before the legislature separately. Members will often hesitate to vote for a vicious bill which stands alone, though they may be willing to vote for an omnibus bill, trusting to justifying themselves before their constituents by that part of the measure which favors local interests. This expedient prevents "riders" also, unless they are on the same matter as the main bill.

Title rules have found approval both in the Federal government and in the states. In the National government their authority is statutory [2] and the scope of the rule is so small that abuses are still possible. Even the rule as it stands is not strictly enforced. In bills not appropriating money there is no restriction. Numerous subjects may be included in a single title; the title may cover less or more than the body of the bill, or indeed need not have any reference to the subject-matter. The only attempted regulation is as to the titles of appropriation bills. The act of August 26, 1842, provides,[3] "the style and title of all acts making appropriations for the support of government shall be as follows: 'An act making appropriations (here insert the object)

[1] *Savannah* v. *State*, 4 Ga. 26, 38 (1848), (Art. 1, Sec. 17.)

[2] *U. S.* v. *Randolph*, Fed. Cas. no. 16, 120 (1853).

[3] U. S. Statutes at Large, ch. 207, s. 2, v. 5, p. 537.

for the year ending June thirtieth (here insert the year).' " The disadvantages accompanying such a lack of system hardly need emphasis. The freedom to join together incongruous measures without even mention of the various subjects included in the law is illustrated by the Immigration act of 1903, which includes a rider providing that no liquor shall be sold in the capitol building.

Title Requirements in the States

In the states much greater advance has been made. Title requirements are found in all but a few of the state constitutions.[1] Generally it is prescribed that every bill shall — (*a*) relate to but one subject; (*b*) which shall be expressed in the title.[2] In some states an exception is made in the case of general appropriation bills, general revenue bills, and bills adopting codes or revisions of statutes.[3]

In New York and Wisconsin the provision applies only to private or local bills.[4] Mississippi requires that

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[1] As to the advantages of such provisions, see *Somerset County Com'rs* v. *Pocomoke Bridge Co.*, 71 A. 462 (Md. 1908), and to the same effect, *Smith* v. *Commonwealth*, 71 Ky. 100 (Bush), (1871).

[2] Ala. 45; Cal. 4, 24; Col. 5, 21; Del. 2, 16; Fla. 3, 16; Ga. 3, 7, 8; Ida. 3, 16; Ill. 4, 13; Ind. 4, 19; Ia. 3, 29; Kan. 2, 16; Ky. 51; La. 31; Md. 3, 29; Mich. 4, 20; Minn. 4, 27; Mo. 4, 28; Mont. 5, 23; N. D. 61; Neb. 3, 11; Nev. 4, 17; N. J. 4, 7, 4; O. 3, 16; Okla. 5, 57; Ore. 4, 20; Pa. 3, 3; S. C. 3, 17; S. D. 3, 21; Tenn. 2, 17; Tex. 3, 35; Utah 6, 23; Va. 52; Wash. 2, 19; W. Va. 6, 30; Wyo. 3, 24.

[3] See, for example, Ala., Col., Del., Miss., Mo., Mont., Okla., Pa., Texas, Utah, Wyo. Even where these exceptions are not made expressly in the constitution the courts have allowed them by holding that the constitution properly construed makes a general revision of a code an exception to the ordinary procedure. *State* v. *McDaniel*, 19 S. C. 114 (1883).

[4] N. Y. 3, 16; Wisconsin 4, 18.

every bill have a title which "ought to indicate clearly the subject-matter or matters of the proposed legislation" and the committee to which a bill is referred must "express in writing its judgment of the sufficiency of the title," [1] and all appropriation bills except the general appropriation bills must embrace but one subject. Arkansas, North Carolina and the New England states have no title requirements in their constitutions.

Mandatory Character of Title Requirements

Where the constitution requires that titles be in a certain form, the courts now hold almost without exception that the provision is mandatory and not merely directory to the legislature. Two early cases, one in California [2] and one in Ohio,[3] held the clause directory, but the California case was later reversed [4] and a new constitutional provision has been held mandatory.[5] In Ohio too, though the court held the clause directory, the opinion was qualified, for the court declared: "Whether a manifestly gross and fraudulent violation of these rules might authorize the court to pronounce a law unconstitutional it is unnecessary to determine." [6] Other states which have had decisions have uniformly held that failure to obey the rule is sufficient to void the law.

Broadness of Title

In drafting bills in states having title requirements it is always important to make the title comprehensive

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[1] Miss. 4, 71.
[2] *Washington* v. *Page*, 4 Cal. 388 (1854).
[3] *Pim* v. *Nicholson*, 6 Ohio State 176 (1856).
[4] *People* v. *Parks*, 58 Cal. 624 (1881).
[5] *Ex parte Liddell*, 93 Cal. 633 (1892).
[6] *Pim* v. *Nicholson*, 6 Ohio State 176, 180 (1856).

enough to include all the subject-matter of the bill. The courts have not adopted a strict construction for the clause. As the Supreme Court of New Jersey declares: "It is only in perfectly plain cases that it is proper for the courts to vacate statutes on the ground now in question," [1] but this should not relieve the draftsman of care to make the title strong enough to stand the severest test. There is danger, of course, that titles may be so broad as to defeat the very object of the requirement — that the title shall advertise the contents of the bill, but "the generality of the title, all the cases agree, is no objection" as to constitutionality if the subject-matter is as broad as the title.[2] So long as the many minor subjects of the bill "are capable of being so combined and united as to form only one grand comprehensive object" the courts will sustain the law.[3] In New Jersey the courts have even sustained statutes with such general titles as "an act concerning cities." [4] Acts establishing criminal codes, political codes and, uniformly, acts dealing with broad general subjects have been sustained by the courts in spite of the generality.[5] The California court has declared that there must be a reasonable

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[1] *Richards* v. *Hammer*, 42 N. J. Law Repts. 435, 438 (1880).

[2] *State* v. *Wilson*, 12 Lea (Tenn.) 246, 253 (1883).

[3] *State* v. *Barrett*, 27 Kan. 213, 217 (1882); *Winters* v. *City of Duluth*, 84 N. W. 788 (Minn. 1901); *Fla. E. C. R. Co.* v. *Hazel*, 31 So. 272 (Fla. 1901); *State* v. *Board of Control of State Institutions*, 88 N. W. 533 (Minn. 1902); *M. K. T. Ry. Co. of Texas* v. *State*, 113 S. W. 916 (Tex. 1908).

[4] *Anderson* v. *City of Camden*, (N. J. Sup.) 33 A. 846 (1896). *State* v. *Bryan*, 39 So. 929 (Fla. 1905), ("public schools").

[5] *People* v. *Linda Vista Irr. Dist.*, 61 P. 86 (Cal. 1900); *Zenner* v. *Graham*, 74 P. 1058 (Wash. 1904); *Weimer* v. *Commissioners*, 99 S. W. 242 (Ky. 1907); *State* v. *Cantwell*, 78 S. W. 569 (Mo. 1904); *City of Baltimore* v. *Flack*, 64 A. 702 (Md. 1906); *Campbell* v. *Skinner Mfg. Co.*, 43 So. 874 (Fla. 1907).

limit to the generality of title that will be allowed. "The provision of the constitution (cannot) be entirely avoided by the simple device of putting into the title of an act words which denote a subject 'broad' enough to cover everything. Under that view 'an act concerning the laws of the state' would be good — the word 'subject' is used in the constitution in its ordinary sense and when it says that an act shall embrace but 'one subject' it necessarily implies — what everybody knows — that there are numerous subjects of legislation and that only one of these subjects shall be embraced in any one act." On this reasoning the court holds that an act, the title of which merely purports to amend one of the codes of the state, expresses no title at all.[1] The measure of legality is whether the title "is sufficient to give notice of the general subject of the proposed legislation and of the interests likely to be affected."[2]

A different case is presented where the title has been made broad, so that it is misleading; there the courts in some states will annul because of generality — the generality becomes a cloak of fraud. "An act to fix and regulate the salaries of city officers in cities of this state," which applies to the officers of a single named city, is evidently one which does not express its object in its title.[3] Nor can "An act to authorize the city of Milwaukee to change the grade of streets" be allowed to stand when the constitution requires that local acts must have the subject expressed in the title, and the body of the

[1] *Lewis* v. *Dunne*, 134 Cal. 291, 295 (1901).

[2] *Johnson* v. *Harrison*, 47 Minn. 382; *Pioneer Irr. Dist.* v. *Bradbury*, 68 P. 295 (Ida. 1902); *City of Knoxville* v. *Gass*, 104 S. W. 1084 (Tenn. 1907); Contra: *State* v. *Clark*, 43 Wash. 664 (1906).

[3] *Coutieri* v. *New Brunswick*, 44 N. J. L. 58 (1882).

act confines the power granted to a district of forty-nine blocks.[1]

Titles which are broader than the subject-matter of the bills may be so not only because of generality but because they contain notice of specific clauses which do not occur in the bill. Titles of this sort may be as misleading as those which do not cover the subject. The courts are divided as to whether such titles should be held to invalidate the law. The better point of view seems to be that taken by the judge of a New Jersey case: "I do not think that it has ever been decided that the court may reject part of the title for the purpose of saving the act. If it may, then a title which expresses a double object can easily be converted into one which expresses a single object and if the court may reject words I do not see why it may not add them. But the very numerous decisions on this subject in our courts do not give the slightest intimation that the judicial branch of our government possesses any such power. The fact is that the court has no more power to reconstruct the title than it has to remodel the act itself. It must take both the title and the body of the act as it finds them."[2] There are many cases, however, in which laws of this sort are sustained — holding that an act need not cover all the field of the title.[3]

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[1] *Anderton* v. *Milwaukee*, 82 Wis. 279 (1892).

[2] *Schmalz* v. *Wooley*, 39 A. 539, 543 (N. J. Ch. 1898); *Pioneer Irr. District* v. *Bradbury*, 68 P. 295 (Idaho 1902). This holding was sustained by a United States Circuit Court of Appeals in 1898. *Crowther* v. *Fidelity Trust & Safe Co.*, 85 Fed. 41.

[3] *State* v. *Heldenbrand*, 87 N. W. 25 (Neb. 1901); *Eaton* v. *Guarantee Co. of N. D.*, 88 N. W. 1029 (N. D. 1902), and *Monaghan* v. *Lewis*, 59 A. 948 (Del. 1905); *State* v. *Bryan*, 39 S. 929 (Fla. 1905), holding that court will decide whether the title was used to mislead, and if it was not, the law will stand; *People* v. *Erbaugh* (Col. 1908),

Narrowness of Title

Where the title is too narrow also, a difficult question arises. Does the insufficiency operate to vacate the entire law, or does only that part fall which does not come within its terms? Practice on this point varies. In some states the constitution specially provides, as in California, that "if any subject shall not be expressed in its title such act will be void only as to so much thereof as shall not be expressed in its title"! Such a rule can be enforced when the bill contains several distinct subjects, yet it is clear that it might result in the dismemberment of an act dealing with related subjects to such a degree that it would be powerless for public good.[1] In others the same standard is adopted by the courts without constitutional provision on the point.[2]

Summary

The standard of judgment for laws with titles too broad or too narrow should be, what rule is the best guard against misrepresentation, to avoid which is the object of titles.[3] Neither the decisions which sustain titles too broad or too narrow furnish as clear-cut a rule as could be desired. A title too broad might induce

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94 P. 349; *City of St. Louis* v. *Wortmann*, 112 S. W. 520 (Mo. 1908); *State* v. *Ross*, 99 Pac. 1056 (Mo. 1909). If both title and bill contain two subjects the case is open to no doubt, "it being manifestly impossible to choose between the two"; *State* v. *Ferguson*, 28 So. 917 (La. 1900).

[1] For provisions of this sort, see Cal., Col., Ida., Ill., Ind., Ia., Mont., N. D., Ore., Tex., W. Va., Wyo.

[2] *State* v. *Beck*, 56 Pac. 1008 (Nev. 1899); *Kafka* v. *Wilkinson*, 57 A. 617 (Md. 1904); *Ex parte Knight*, 41 S. 786 (Fla. 1906); *Memphis St. Ry. Co.* v. *Byrne*, 104 S. W. 460 (Tenn. 1907); *Manistee & N. E. R. Co.* v. *Com'rs*, 76 N. W. 833 (Mich. 1898).

[3] Good discussion in *Somerset County Com'rs* v. *Pocomoke Bridge Co.*, 71 A. 462 (Md. 1908).

the passage of a law which otherwise would fail; this would be true even though the title offended only because of indefiniteness. Some latitude must be granted in such cases, for it is obviously impossible for every part of the law to be enumerated in the title. But at least where the law has a title too broad because of the inclusion of positive terms, the safe rule is the annulment of the whole law. Where the title is too narrow no part should stand which is not covered by the title, otherwise the title loses its value. Whether *any* of the law should stand should depend on the intent of the legislature. If it is evident that the legislature would not have passed the law without the offending clauses, the whole act should fall. Even where the parts of the act are separable, one being covered by the title, it seems hardly safe for the courts to presume that the legislature would have passed that part standing alone. There is no way to show that some members may not have been induced to vote for the law because of the offending portions, unaware that the title did not cover them. In other words, if the court assumes to decide what the legislature would have done if the title portions only were under consideration, it opens the door to one of the shrewdest sorts of lobbying. A bill may be made a log-rolling measure to get the votes of the majority, but be made invalid as to all portions except those favored by the lobbyist, through the fact that the title covers only those portions. In such a case the courts, if they sustain part of the bill, defeat the intent of the legislature at the very time they try to give it effect.

Legislative convenience is the best guarantee that the constitutional requirement will not be defeated by the general use of unnecessarily broad titles. As a bill passes through the legislature it must frequently be

referred to in debate. Reference to the number alone will often not identify the bill; if the title is too broad it will not distinguish it from other bills on the same subject. The greater convenience of a short expressive title will usually eliminate those which would defeat the spirit of the constitution. It is not to be overlooked, however, that the use of too general titles would bring us back almost to the point from which we started and it is on just the bills in which the clause was meant to prevent abuse that there will be the greatest temptation to put a vague, general and deceptive caption. Narrow titles are less easy to avoid; in fact a bill may be broadened in scope by amendment, so that the title may become insufficient, though there was in the combination of provisions no attempt to deceive.

But whatever the holdings of the various state courts may be as to titles there is only one standard safe for the draftsman to follow — make the title as concise as possible but broad enough to indicate clearly the scope of the bill. A title will be liberally construed as to its generality. The inclusion of misleading statements as to the scope of the bill, or failure to cover its real scope, puts the whole bill in a doubtful position before the courts.

The question has been raised in several states as to whether the addition to the title of such expressions as "and for other purposes," "et cetera" and "and so forth" can broaden the scope. Curiously enough, in Georgia, the state where the title requirement was first adopted, the inclusion of "and for other purposes" has been held sufficient to guard against surprise.[1] In

[1] *Martin* v. *Broach*, 6 Ga. 21, 27 (1849); *Black* v. *Cohen*, 52 Ga. 621, 626 (1874). The constitution of Georgia of 1877 adopted a provision that "every law shall contain only one subject expressed in

Pennsylvania it has been held that the title, "An act to protect fruit gardens, growing crops, grass, et cetera, and punish trespass," was sufficient, by reason of the words "et cetera," to include a provision in the act punishing injury to ornamental trees, and the Tennessee courts have followed a similar standard.[1] But the decisions in other states hold the opposite. In fact, to the extent that such expressions can enlarge the title, they can destroy the value which it has come to have under our constitutions and make it a cloak for acts which, were their object avowed, would have no chance for passage.[2]

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the title." The later cases continue to hold, however, the use of indefinite words can expand the title to include subjects related to those expressed. *Macon* v. *Hughes*, 110 Ga. 795 (1900), (dictum); *Banks* v. *State*, 52 S. E. 74 (Ga. 1905).

[1] *Commonwealth* v. *Clark*, 3 Pa. Sup. Ct. 141 (1896); *Garvin* v. *State*, 13 Lea. (Tenn.) 162, 168 (1884).

[2] *Divet* v. *Richland County*, 76 N. W. 993 (N. D. 1898); *Lincoln Asso.* v. *Graham*, 7 Neb. 173, 179 (1878); *St. Louis* v. *Tiefel*, 42 Mo. 578, 592 (1868); *Ryerson* v. *Utley*, 16 Mich. 269, 277 (1868); *Fishkill* v. *Fishkill Co.*, 22 Barbour (N. Y.) 634, 642 (1856); *State* v. *Hackett*, 5 La. Annual 91, 94 (1850); *Lacey* v. *Palmer*, 93 Va. 159 (1896).

CHAPTER V

THE PREAMBLE

The object of the changes which have been introduced in the form of modern statutes is to make them simple in expression. In the last fifty years the subject-matter of our laws has become more complex than ever before and the result is a demand that all unnecessary parts of acts be eliminated. One factor in this process of change has been gradual abandonment of the preamble, which stately introduction, like the prologue of a play, formerly gave notice of the circumstances which called forth the act. Many of the American states have practically ceased its use. In New England and New York it appears very rarely. It is still used in about one-twelfth of the acts of Maryland,[1] a state backward in many other respects in the form of its legislation. It is found less frequently in Delaware. In Pennsylvania and Virginia, where it was prevalent twenty years ago, it is now of only occasional occurrence.

The customary use of the preamble will preserve it in some states for an indefinite time, even in cases where it is without a function, but it is certain to disappear as the usual or even frequent feature of our laws. Indeed preambles are not, properly speaking, parts of acts. They

[1] In the General Public Acts of 1910 there are eleven acts with preambles and one hundred and thirty-seven without. This is about the proportion which has been found in that state for the past twenty years.

are only explanations, arguments or apologies, following the title and preceding the enacting clause.

Unlike the title, which constitutional provisions have recognized as able in certain cases to control the bill, the preamble has no influence if the bill is clearly drawn. Lord Coke declared that: "The rehearsal or preamble of the statute is a good meane to find out the meaning of the statute and as it were a key to open the understanding thereof." [1] But it is equally well established that the preamble of a statute is no more than a recital of some inconveniences which do not exclude the others for which a remedy is given by the enacting part of the statute.[2] It cannot expand or contract the scope of the act when its provisions admit of only one interpretation. It may be consulted to determine the intent of the legislature, but it is only confirmatory, never controlling, evidence.[3]

That preambles should have no control over the scope of the bill is indicated by the circumstances which prompt their use. Often a specific evil calls for remedy and the legislature lays down a general rule in the law to govern that and all similar cases, though the preamble cites only the instance which occasioned the law. Conversely, the

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[1] Co. Litt. 79a, 4 Inst. 330. Quoted by Beale, E., Cardinal Rules of Legal Interpretation, 2d ed., p. 253.

[2] Bac. Abr. Statute (I) 2. Quoted by Beale, E., Cardinal Rules of Legal Interpretation, 2d ed., 253.

[3] *Hahn* v. *Salmon*, (C. C.) 20 Fed. 801 at 809 (U. S. 1884); *Philadelphia* v. *Passenger Ry. Co.*, 1 Leg. Gaz. R. 163; *Coosaw Min. Co.* v. *S. Car.*, 144 U. S. 550 at 562.

"Two propositions are quite clear — one that a preamble may afford useful light as to what a statute intends to reach, and another that if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment." *Powell* v. *Kempton Park Racecourse Co.*, (1899) A. C. 143 at p. 157. Quoted by Beale, E., 259. See also *State* v. *Sheldon*, 113 N. W. 208 (Neb. 1907), and *Neuman* v. *City of New York*, 122 N. Y. S. 62 (1910).

preamble may be a loose declaration of general principles though the act is intended to cover only a small part of the field. In either case it would be defeating the intent to hold that the preamble was a conclusive measure of the legislative will.[1]

There are still cases, however, where the preamble is useful, though in almost no case indispensable:

I. Certain statements, it may be, ought to appear in connection with the statutes which would not properly be placed in the body of the act, or would not find even a notice in the legislative journals. Preambles of this nature appear in acts of Congress and the states. Such are those calling attention to acts of other states or countries which necessitate the action to be taken.

A somewhat similar use is that found in states whose constitutions require that notices of an intention to apply for local or special acts shall be published in the localities to be affected and that the act itself indicate that this preliminary has been complied with.[2] A statement of this sort could be put in the title, and that is done in some states. In others, for example Louisiana and Missouri, it is customary to put the recital required in a preamble.

II. The most important function of the preamble (and the only one in which it seems to be of real value), except in the states mentioned above, is not in acts proper but in resolutions. Where these are not of a law-making character but are expressions of opinions, desires, or condolence, the preamble is a useful preface to the thought to be expressed.

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[1] *State* v. *Ohio Oil Co.*, 49 N. E. 809.

[2] Where this use of the preamble is made it can hardly be said that it does not form a part of the bill.

Except for these purposes the preamble is now negligible and exceptional in all but the states mentioned above. The following examples illustrate the more common uses of the preamble, and the small utility it ordinarily has. The Laws of Delaware for 1908 provide:

"Whereas, Many of the buildings now used by the colored children for school houses are unfit and inadequate for the purpose; and

"Whereas, The financial condition of the colored people is such that they can not afford to build school houses through taxation, solely, as provided in the general school laws of the State, therefore,

"Be it enacted by the Senate and House of Representatives of the State of Delaware in General Assembly met:

"Section 1. That the sum of one thousand dollars is hereby appropriated from the State Treasury....." [1]

The Laws of Maryland provide that, "Whereas, the International language known as 'Esperanto' is making steady advances in many of the progressive nations of the world and has been recognized by a number of International Congresses; and Whereas, this language is meeting the long felt need for a simplified yet superior medium of communication between nations, not supplanting national tongues, but furnishing a secondary language for all, therefore, Be it enacted..... the International language known as Esperanto may in the discretion of the State Board of Education be added to the branches required to be taught in the State Nor-

[1] Vol. XXV, Part I, p. 168, ch. 90.

mal Schools and in the high schools by the various counties of the state." [1]

There is no fixed form for a preamble. It may be simply a recital without any formal introduction.[2] As a rule, however, it opens with "whereas," which is usually repeated at the beginning of each paragraph. Long preambles become ponderous if this periodic construction is used, and it is less confusing in such cases to use the less formal, simple narrative.

The preamble should come before the enacting clause. Occasionally it appears after the enacting clause, but this arrangement is to be avoided because it in form enacts what is merely recital. In addition it confuses the reader because it seems to make necessary the repetition of the enacting clause when the subject-matter of the law is reached.

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[1] Laws of Maryland, 1910, ch. 757. It is better practice and theory to have the arguments and apologies for bills appear in debate rather than in printed measure.

[2] See Va. Acts of 1887–8, ch. 176.

CHAPTER VI

THE ENACTING CLAUSE

Following the title and the preamble, if one be used, comes a short clause which declares that what follows is made law, and the authority by which it is given that character. This is the enacting clause or "style" of a law which, though it appears in a number of forms in the different states, is of practically uniform content.[1]

In the usual form the clause starts with "Be it enacted," followed by the authority upon which the act rests — the general assembly, the legislature, the people of the state represented in senate and assembly, or some other term representing the legal or actual sovereign. In states using the referendum, the style of the laws tends to become: "The people of . . . enact," — at least in laws passed on by popular vote, indicative of the fact that the law comes direct from the citizens.

The form of enacting clause is prescribed by constitution except in the Federal government and in the constitutions of Delaware (1897), Georgia (1877), Kentucky (1890), Pennsylvania (1873), and Virginia (1902). Statutes have in some cases supplied a form to be used, and custom in other cases has prescribed a rule. In Georgia the greatest freedom is kept, as many as four-

[1] Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows (Mass. 2, 6, 8).

teen different forms of enactment being found in her session laws.

By statute the Federal government has prescribed that all acts shall use as enacting clause the form, "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled."[1]

Rules of the houses and statutes are also found in some states, the intent of which is to secure uniformity.

Of course in states where the form of enactment is regulated only by statute or custom, irregularity in phrasing this clause results only in destroying the uniformity which should characterize the formal parts of our laws. There would be no question of constitutionality which could be raised in the courts because of the failure to follow the usual standard.[2] Any clause which made it evident that what followed was intended by the legislature to be made law would suffice to give the character to an act. One authority states the rule thus: "Where the enacting words are not prescribed by a constitutional provision the enacting authority must notwithstanding

[1] Revised Statutes, ch. II, sec. 7. All joint resolutions are to be in the following form: "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled." Revised Statutes, ch. II, sec. 8. The resolving clauses used in submitting Federal constitutional amendments may be found in 1 sess. First Cong. Journal, p. 89, Gales and Seaton ed.; 1 sess. Third Cong. Journal 7, 79, Gales and Seaton ed., and 15 Stat. at L., p. 346.

[2] For a discussion of instances in which the formula prescribed for Congress has been consciously departed from to give the law a declaratory as well as legislative character, see discussions by a conference committee in 1816. Journal, p. 463; Annals, p. 1014–1023 (House Conferees report), and Journal, p. 396–7, Annals, p. 1048–50, 1057 (Senate Conferees report).

be stated and any words which do this to a common understanding are doubtless sufficient; or the words may be prescribed by rule."[1]

Conformity to the standard set by law or custom should always be sought in drawing these parts of laws, if for no other reason than because of the prejudice which may be aroused against a bill if it appears to be carelessly drawn.

In states where the constitution stipulates the form of the enacting clause, exactness is not only advisable, but often imperative. The rule the constitution prescribes is held to be mandatory and the law is void if the clause is not quoted verbatim. To make omissions or inaccuracies less likely, some states print the formula to be followed on the paper on which bills are to be drafted. In other states the enacting provision given in the constitution is held to be directory only. Fourteen states have passed upon the question. Eight hold the provision mandatory, six directory. Since 1887 one state has declared for the former, four for the latter rule.

The cases are so contradictory that it is impossible to tell, in any state where the point has not been decided, what would be the probable position the courts would assume on the question. In such states no one drafting a law should jeopardize its legality by a failure to use the exact constitutional formula. This is the case especially since the decisions holding the provisions directory are against the holdings of writers on parliamentary law.

Mr. Cushing states the rule as follows, though it is clear from the cases that the standard he outlines is not now one that has general acceptance: "When enacting words

[1] Cushing, Parliamentary Law, sec. 2102. Several cases are noted below, however, in which the law was sustained though the enacting clause was lacking altogether.

are prescribed nothing can be a law which is not introduced by those very words even though others which are equivalent are at the same time used." [1] Further, an accepted rule of interpretation is that constitutional requirements are mandatory and no provision will be construed otherwise unless the intention that it shall be appear conclusively on its face.[2]

But as indicated above, our courts are in hopeless disagreement when they come to apply this principle to laws which lack the prescribed enacting clauses or have them only in defective form.[3] The decisions vary

[1] Cushing, Parliamentary Law, sec. 2102.

[2] Mr. Cooley has shown the dangers which are incurred when courts apply to constitutional provisions those rules which distinguish mandatory and directory statutes — in his Constitutional Limitations, p. 93.

[3] Enacting clause is held mandatory in, —

Alabama: *Montgomery Amusement Co.* v. *Montgomery Traction Co.*, 139 Fed. 353 (1903). Law which is enacted by "the Legislature of Alabama" is not void if it declares that that body was also "the Legislature of the state of Alabama." The former expression is mandatory. The case cited is a Federal decision following the one in the state court.

Illinois: *Burritt* v. *State Contracts Com'rs*, 120 Ill. 322 (1887). An act "resolved by the Senate" is void.

Michigan: *People* v. *Dettenthaler*, 77 N. W. 450 (1883). Enacting clause mandatory.

Minnesota: *Sjoberg* v. *Security Savings and Loan Assn.*, 73 Minn. 203 (1898). Law void without enacting clause.

Nevada: *State* v. *Rogers*, 10 Nev. 250 (1875). The omission of the words "Senate and" from the enacting clause renders the law void.

North Carolina: *State* v. *Patterson*, 98 N. C. 660 (1887). Omission of an enacting clause destroys the law.

Oregon: *State* v. *Wright*, 14 Ore. 365 (1887). "If the bill was without an enacting clause it could not be law, but the mutilation of the bill could not destroy the legislative intent."

Washington: *In re Seat of Government*, 1 Wash. T. 115 (1861). Lack of enacting clause voids the law.

all the way from holding that entire absence of enacting provisions does not destroy the law even where there is an expressed constitutional form, to the contention that a law without an enacting clause is void although there be no constitutional provision requiring it.[1]

The varying attitudes of the courts are shown in the Minnesota and Maryland decisions. The Minnesota court declares: —

"Strict conformity with the constitution ought to be an axiom in the science of government. Unless a

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Enacting clause is directory only in, —

Maryland: *McPherson* v. *Leonard*, 29 Md. 377 (1868). The enacting clause was, "Be it enacted by the General Assembly of Maryland." Held, the omission of all after "enacted" did not destroy the law. *Postal-Telegraph Cable Co.* v. *State*, 73 A. 679 (1909); also *State* v. *Baltimore and O. Ry. Co.*, 77 A. 433 (1910).

Mississippi: *Swann* v. *Buck*, 40 Miss. 268 (1866). "Resolved by the Legislature" is sufficient. The constitutional provision is only directory.

Missouri: *City of Cape Girardeau* v. *Riley*, 52 Mo. 424 (1873). An act regularly passed is valid though enacting clause be omitted.

Oklahoma: *Ex parte Hudson*, 106 P. 540 (1910). Omission of enacting clause not fatal. Applies only to initiative and referendum.

Tennessee: *State* v. *Burrow*, 104 S. W. 536 (1907). Exact statement not necessary — presumptively mandatory.

Utah: *Watson* v. *Corey*, 6 Utah 150 (1889). Lack of enacting clause does not *per se* invalidate.

Laws passed by joint resolution have been held sufficient even where an enacting clause is prescribed in, —

South Carolina: *Smith* v. *Jennings*, 45 S. E. 821 (1903). Resolving clause will replace enacting clause and still not violate constitution.

Texas: *Weekes* v. *City of Galveston*, 51 S. W. 544 (1899). Enacting clause provision of constitution does not apply to laws passed by joint resolution.

[1] *In re Seat of Government*, 1 Wash. T. 115 (1861).

constitutional provision shows upon its face that it was intended to be directory, it must be accepted as the imperative mandate of the sovereign people, and not as good advice which legislators and courts may accept or reject as they please. . . . But it is claimed that the provision (was) directory only . . . intended simply to secure uniformity in the style of all laws. . . . This is one of the objects intended but not the only one. . . . The almost unbroken custom of centuries has been to preface laws with a statement in some form declaring the enacting authority. If such an enacting clause is a mere matter of form, a relic of antiquity, serving no useful purpose, why should the constitutions of so many of our states . . . prescribe its form. . . . The concession that the object of the constitution in prescribing the style of the enacting clause was to secure uniformity necessarily implies that the matter of an enacting clause was so essential and important as to require uniformity. . . . Surely it was not the intention to secure uniformity in the style of a useless form." [1]

In holding the provision on the enacting clause to be directory only, the court in the leading Maryland case declares: "We . . . cannot regard the provision requiring the words 'by the General Assembly of Maryland' to be in the enactment of a law as otherwise than directory to the Legislature to secure, as we have before said, uniformity in the laws. They certainly are not of the essence of the law. They furnish no aid in its construction and its provisions are as clear and intelligible without them as they would be with them." [2]

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[1] *Sjoberg* v. *Security Savings and Loan Asso.*, 73 Minn. 203 (1898). This case contains a good discussion also of the cases in which parole evidence has been allowed to be introduced to prove that an enacting clause absent in the enrolled bill was present in the bill during passage.

[2] *McPherson* v. *Leonard*, 29 Md. 377 (1868). Quoted and ap-

Whatever may be our opinion as to the relation of such doctrine to the usual rule of constitutional construction, it must be admitted that the failure to live up to this constitutional rule is followed by no such evil consequences as would follow if the same interpretation were placed, for example, upon the provisions relating to the titles of bills, where, indeed, the courts have, almost without exception, held the provisions mandatory.

Formerly it was the custom to repeat the enacting clause before each section. This was a practice inherited from England. The Federal government has provided by statute of 1871 that "no enacting or resolving words shall be used in any section of an act or resolution of Congress except in the first." [1] In some of the states the repetition still appears sporadically, due to disappearing custom or the preference of the member or lawyer who drafts the bill. In others the old form is still a well established custom, as, for example, in Maryland, which uses a peculiarly clumsy phraseology of enactment. The original enacting clause is regularly followed by a paraphrase of the title — which in Maryland practice is itself inexcusably long — and the succeeding sections

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proved in *State* v. *Baltimore and O. Ry. Co.*, 77 A. 433 (1910). A Nevada court adopts the following language: "On its face the act purports to have been enacted by the people when represented in assembly only. Without the concurrence of the Senate the people have no power to enact any law. Every person at all familiar with the acts of legislative bodies is aware that one of the most common methods adopted to kill a bill . . . is for a member to move to strike out the enacting clause. If such a motion is carried the bill is lost. Can it be seriously contended that a bill with its head cut off could thereafter by any legislative action become a law? Certainly not." *State* v. *Rogers*, 10 Nev. 250, 260 (1875.) Several of the cases adopt arguments which, like this, are inconclusive of the question whether the *exact* phraseology is essential.

[1] Revised Statutes, section 9.

are opened by repeating the enacting clause. The laws of 1910 show several cases where the enacting clause is repeated as many as eleven times in acts covering only two pages. In most of the states, however, the repetition, like the use of the preamble, is disappearing with the other legislative forms which belong to a past more lenient toward verbose laws.

Practice varies as to where the enacting clause should be placed with reference to the first section of the bill. Up to 1850 when the "Act for shortening the language used in acts of Parliament"[1] was passed, the English practice was to unite the preamble, enacting clause and first section in one paragraph, which was unnumbered. The act of 1850 placed the enacting clause before the first section, making its application to the whole bill clearer and removing the temptation to repeat the clause at the beginning of each succeeding paragraph. All the sections were then assigned numbers. In spite of the obvious advantages of this system, Congress still includes the enacting clause in the first section[2] which remains unnumbered.

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[1] 13 and 14 Victoria, ch. 21.

[2] 59th Congress,
1st Session, H. R. 7058.

In the House of Representatives,
December 13, 1905.

Mr. Floyd introduced the following bill; which was referred to the Committee on Military Affairs and ordered to be printed.

A BILL

For the erection of a national sanitarium for disabled volunteer soldiers at Eureka Springs, Arkansas.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That two hundred thousand dollars be, and the same is hereby, appropriated for the erection of a national sanitarium for disabled volunteer soldiers at Eureka Springs, Arkansas, etc.

The practice in the states varies. Some place the enacting clause in a section numbered one,[1] but the better practice is that followed by many states — to put the clause before all of the body of the law; a plan which allows the numbering of all sections, as in England.[2]

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[1] An Example is Pennsylvania:

105 — Printer's No. File Folio — 829.

LEGISLATURE OF PENNSYLVANIA.

FILE OF THE HOUSE OF REPRESENTATIVES.

No. 26. Extraordinary Session of 1906.

Mr. Shern, in place, February 5, 1906.

Mr. Watkins, Judiciary General, February 6, 1906.

AS AMENDED ON SECOND READING IN HOUSE OF REPRESENTATIVES FEBUARY 8, 1906.

Strike out in ( ) insert in Italic.

AN ACT

To improve the government of cities of the first class within this Commonwealth by prohibiting the (giving) solicitation, collection or receipt directly or indirectly by or from officers or employes of such cities of any assessments or contributions for any political purposes whatever and by providing that any violation of this act shall be punished as a misdemeanor.

Section 1. Be it enacted by the Senate and House of Representatives of the Commomwealth of Pennsylvania in General Assembly met and it is hereby enacted by the authority of the same, That no officer, clerk or employee (etc.).

[2] COMMONWEALTH OF MASSACHUSETTS.

In the Year One Thousand Nine Hundred and .....

AN ACT

To.....

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows: — Section 1.

CHAPTER VII

THE ARRANGEMENT OF SUBJECT-MATTER OF BILLS

The complicated phraseology of statutory law has long been criticized; its cause is seldom closely studied. Usually the discussion assumes that the difficulty is one inherent in statutes and that any act dealing with a complicated subject must of necessity lack clearness. We cannot hope that rules laid down to regulate complex social relations can be as easily comprehended as those which deal only with single acts of individuals, but there need be no difficulty in understanding each part of an act and the complexity of the statute as a whole can be confined to that caused by the subject-matter. The involved language of our laws is due in no small degree to a failure on the part of the draftsman to visualize the elements of the rule he wishes to frame and to arrange them in the simplest order.

Every law has at least two elements, the legal subject and the legal action. An increasing proportion have in addition, due to the fact that they are not of universal application, one or both of two others. The "case" to which the legal action is confined and "the conditions" upon which it will operate, may be stated. These four parts only are found in a legislative expression.

The Legal Subject

Laws affect persons. When the benefit conferred is to the public generally, it is called a right, when to persons

named or to a class less than the public, it is a privilege. Privileges which are granted to be used for the benefit of persons other than those enjoying them are called powers. Rights, privileges and powers granted to certain persons necessarily involve liabilities and obligations on other persons. Rights, privileges, powers, obligations and liabilities can by their nature rest only on persons. Only by a figurative use of language can a *thing* bear a liability or be possessed of a right.

The persons, who may or may not, shall or shall not, do or submit to something, are *legal subjects*. The description of these persons determines the extent of the law. They must be exactly stated in order that the law may confer rights and privileges on all whom it is intended to benefit and on no others. The *legal subject* of an act demands even more exact definition in America than elsewhere, for in other countries if it offends by too great or too little generality the only objection raised is that the law is badly drawn and does injustice to some individual. In America, failure to define the legal subject properly may make the law liable to the charge of class legislation because certain ones not within the intended scope of the act have been included or excluded, producing discrimination where there is no difference. For this defect the law may be overturned as unconstitutional and the wrong done to individuals by the inaccurate description of those to be affected is replaced, through the complete lapse of the law, by what is usually a greater wrong — the harm done to all those intended to be benefited. Too great care cannot be taken in defining those to whom the law is to apply. Avoiding a statement of the persons who constitute the legal subject is too often a mask for carelessness on the part of the draftsman. It shifts the burden of determining the

extent of the law from the draftsman to those who must obey it.[1]

There are cases, however, when enumeration of the persons who form the legal subject would necessitate repetitions or would make the law awkward in form. In such cases, if the persons whose rights will be affected are already clearly determined in some other part of the act, or by circumstances, the use of a thing as the legal subject is not open to objection.

Similarly the impersonal form, "it shall be lawful" or, "it shall be unlawful" is justified when enumeration would be awkward, and failure to enumerate does not make the law indefinite. But this form should be avoided where possible. It is of no advantage where the persons can easily be stated. In the sentence: "It shall be unlawful for any person to sell, furnish or give away any strong, spirituous or malt liquors at any public auction held in this state,"[2] it would have been better to say, "No person shall sell," etc. In general, the use of the impersonal form is further objectionable because it encourages the use of the passive form of the verb — a much weaker construction than the active form.

In stating the legal subject, it is often necessary to use descriptive language. In the creation of a

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[1] See Wis. Laws 1911, p. 142, ch. 148, for several indefinite subjects. In some cases there is no doubt as to those who are bound even though a thing be nominally the legal subject. Thus in Wis. Laws 1911, ch. 181, p. 177, "Wind shields may be used in Dane county while engaged in fishing through the ice with hook and line." "Wind shields" is a legal subject and should give way to "any person may." In this case no indefiniteness results, but the statement of the law would be much stronger if persons and not things were made the subject.

[2] Wis. Laws 1911, ch. 139, p. 137.

board, for example, the law may declare: "The Secretary of State, the Lieutenant-Governor and the Civil Service Commissioner are constituted a board of ——." The ordinary rules of composition apply to such statements. The tense of verbs used should be the historical present, the use of the future or imperative forms, such as "The Secretary of State, the Lieutenant-Governor and the Civil Service Commissioner shall constitute," etc.,[1] is to be avoided.

The Legal Action or Predicate

The legal action is the essence of the law. It declares that a person may or may not, shall or shall not, do or submit to certain acts. The right, privilege, power, obligation or sanction of the law is described in the legal action. Care must be taken not to confine the right so closely that the object of the act will be defeated, nor must it be so broadly extended that the rights of others will be needlessly overridden. The legal action should be stated in a way which will make it stand out at once, so that the policy aimed at will at once focus the attention of the legislator. A good law gathers strength from direct statement; a bad one may hide under confused language.

In the construction of the legal action certain rules of composition should be followed. A law may confer a right, privilege, or power, which is to be exercised at the will of the legal subject. It may be mandatory, commanding that the legal subject do or abstain from, submit to or refuse to submit to, a certain act. Modes

[1] This quotation illustrates the possibility of ambiguity arising in the wrong use of verb forms. Are the persons named to be the board or are they to "constitute" or "establish" it by appointment or some other means of selection?

of speech adapted to these objects should be chosen. Where the law is permissive the language should be permissive, and the verbs should, as a rule, employ the auxiliary "may" or its negative "may not." Where the law is mandatory the forms "shall" and "shall not" are preferred.

The substitutes frequently found, used apparently to avoid the uncertainty that has come to surround the use of "may" and "shall," are seldom stronger than these phrases. As a rule they are little more than padding. "It is hereby allowed, authorized and required," "shall and is hereby required to," "is authorized and empowered," "shall be deemed," "it shall be the duty," "it is hereby required," "it shall be lawful," and a host of similar provisions are not as good as the words they replace. The senseless verb combinations occasionally met with, which declare that a certain person "may and shall" do a certain thing or "shall and may" enjoy a certain privilege, are indefensible.

A caution, which current legislation shows is much needed, is against using the words "may" and "shall" in any part of the bill except the legal action. It rarely if ever occurs that the language of an act necessitates using these auxiliaries in other parts of the bill. The carelessness of draftsmen in so doing has doubtless been one of the elements contributing to destroy in legal language the exactness of meaning which these verbs have in the purely grammatical sense.

Another rule that should be carefully followed is to keep the legal actions close to their respective subjects so that the court may not be called upon to distribute them to their proper places by construction, *reddendo singula singulis*.

Examples of Legal Subjects and Actions

The following examples taken from current legislation illustrate the principles discussed:

Subject.	Action.
The commissioner of insurance	shall have the power of visitation and examination into the
or	
Any person he may appoint	affairs of any domestic or foreign society.
He	may employ assistants for the purpose of such examination and
he	shall have free access to all the
or	books, papers and documents
any person he may appoint	that relate to the business of the society and
(he)	may summon and qualify as witnesses under oath and examine its officers, agents, and employees or other persons in relation to the affairs, transactions and condition of the society.
The expense of such examination	shall be paid by the society examined upon statement furnished by the commissioner of insurance and
the examination	shall be made at least once in three years.[1]

This law illustrates both good and bad practice in drafting. The first six subjects are persons and definite. The last two are things, which should not have been made legal subjects though there is not in these cases any resulting ambiguity. The subject of the sentence beginning, "The expense of" evidently should have been, "The society examined." In the last sentence, if it remains in its present position "the commissioner of

[1] A portion of ch. 216, Wis. Laws 1911, p. 214, 220.

insurance" should be used as its subject. It would have been better to include it in the first sentence, the predicate of which should then read, "shall visit at least once in three years." As the law now stands the first predicate, defining something to be done for the public interest, is mandatory in fact, though facultative in form, under the rules of construction elsewhere discussed. The last sentence is mandatory, as it is evident the entire law is meant to be. The predicate next to the last could be improved by stating to whom the payment should be made, so that the sentence would read, "The society examined shall pay the commissioner of insurance the cost of the examination on a statement furnished by him."

Additional Elements in Laws not of Universal Application

Comparatively few modern laws consist only of legal subject and legal action. Few rules are of universal application. The standard of flexibility claimed for the early common law, that it had a rule to fit each case with justice, is as impossible to attain by statute as it in fact proved to be by the common law. Neither is flexible enough to keep up to changing social conditions. If statute law were to be of general application and could not be confined to certain cases and conditions it would prevent the finer adjustments to new and complicated situations which modern life demands.

The minuteness with which modern statute law regulates our lives is subject to insistent criticism. That mistakes and officious interference are unknown no one would claim, but our modern law is excellent only to the extent to which it has adapted itself to the complex conditions under which we live. Properly managed the "special legislation" so much decried is, with few exceptions, the only sort of law which is logical or just.

A general rule crushes initiative. It brings uniformity at the sacrifice of healthy variety. It rests heavily on one portion of society while others are untouched by its burdens. It subjects some to the constant rigors of the law, while others remain lawless. If modern legislation is to fulfill the demands made upon it, it must supplement the rules laid down in the constitutions as a framework upon which society shall rest, by an ever increasing number of special adjustments. Logic and our legislative practice show — much as the conclusion may seem to clash with our expressed constitutional standards — that the ideal legislation is legislation for special cases and conditions. Laws of universal application can be the bulk of the statutes only in a simple society. In a complex and changing civilization they may become one of the chief obstacles to progress. Admittedly the fine adjustment of the law to special cases destroys the possibility of keeping it so simple "that he who runs may read," but it destroys a danger greater than that advantage would be — the danger that the law may become a fixed mould, restraining growth rather than giving it encouragement.

To avoid these consequences two chief expedients have come into use, definition of the case in which the law shall apply and of the conditions which must be fulfilled before it can operate.

The Case

If a rule is not to be of universal application it seems almost axiomatic that the cases in which it is to operate should first be set out. Salvos, provisos and exceptions which now confuse our legislation would almost disappear if this rule were kept in mind. An examination of the current legislation of some of our states

shows that in almost one-third of the public laws not of universal application these awkward and confusing expedients are used by the draftsman to escape the consequence of the general rule he has first laid down. The law would be simpler, more easily understood, would not mislead the reader as to the extent of its provisions, and finally, would be much easier of statement if the limitations were put in the statement of *when* the law shall operate.

The position, form, mode and tense of the "case" are not essential but if they follow certain rules the object of this portion of the law is more easily recognizable. Since the case is to describe the instances when the law is to operate, it should, normally, be the first portion of the body of the bill. The reader is thus early informed whether the law touches a state of facts about which he wishes to know the law. It will be found convenient to have the case start with such words as "when," "where," "whenever," "in case," or "in the event that." Since the law operates *only under a supposed state of facts* the natural mode would be the subjunctive. But the subjunctive and conditional forms of the verb are the same. The conditional form is needed for the expression of the conditions under which laws of less than universal application shall operate. The indicative mode is therefore preferred.

All laws in theory act in the present even though their actual operation be suspended till some future time. On the statute books they stand as continuing commands. The tense favored, therefore, for describing the cases in which they are to operate is the present. The future form is especially to be avoided. It is easily confused with the imperative which is needed for the statement of the legal action. In fact the use of the future form in statement of the case is logically absurd. In such state-

ments as "whenever any deer shall be shot," and "in case a county shall lie partly in two senatorial districts," the future form is evidently meaningless. The careless use of "shall" is objected to because, *on first reading*, it makes it difficult to distinguish language meant to be descriptive from that meant to be imperative. In many cases even careful study will still leave a doubt as to whether the law meant to express command or merely to state a condition.

The context will usually indicate the intent, or it can be found by the familiar rules of construction, but, so far as possible, reliance on these sources to determine what the law means should be avoided. For example, "In the 29th section of the Poor Law Amendment Act (4 and 5 Wm. 4, c. 76) the word 'shall' occurs in two consecutive phrases: 'the poor of such parishes who *shall* be maintained or relieved in or out of any workhouse of such union, for which each such parish shall in future be charged separately.' The first 'shall' is in a phrase which the context shows to be descriptive merely; upon the second 'shall' a most important consequence depends; if it be descriptive like the first, it causes the burden of the whole maintenance of the poor in a union to fall in a manner exactly the contrary of that in which it will fall if the 'shall' be imperative." [1] The following examples illustrate the use of the "case."

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[1] Coode, G. On Legislative Expression. Published as an introduction to the Appendix of the Report of the Poor Law Commissioners on Local Taxation, presented to Parliament, 1843. Republished in The Law Library, T. and J. W. Johnson, Philadelphia, 1848. This is the classic authority on this subject in England. The principles laid down by Coode have been adopted with small modification by subsequent writers. They are the basis of the present-day practice in drafting bills for the British Parliament and have been used in writing this chapter.

Examples of Legal Subjects, Actions and Case

The subject-matter is here divided to indicate the elements of the law, but the sequence is the same as in the statute.

No. 113A. Published May 13, 1911.

CHAPTER 134.

AN ACT to create section 13m, of chapter 72, of the laws of 1897, relating to a deputy clerk for the clerk of the municipal court at Racine.

The people of the state of Winconsin, represented in senate and assembly, do enact as follows:

Section 1. There is added to chapter 72, of the laws of 1897, a new section to read: Section 13m.

Case.	Subject.	Action.
In case of the sickness, temporary absence or disability of the clerk of said court,	said clerk	may by order in writing, filed and recorded in said court appoint a deputy to discharge the duties of said clerk during such sickness, absence or disability who shall have all the powers of said clerk while administering such office.
In the event that the disability of said clerk is of such a nature that he is unable by reason of his physical and mental condition to appoint a deputy,	the judge of said court	shall make such appointment
	Such person so appointed	shall be known as the "deputy clerk" of the said municipal court.

Section 2. This act shall take effect and be in force from and after its publication.

Approved May 12, 1911.[1]

[1] Wis. Laws 1911, p. 134.

An example showing the use of a more complex "case" is:

Case.	Subject.	Action.
(1) Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods and (2) such retention of possession is fraudulent in fact, or is deemed fraudulent under any rule of law,	a creditor or creditors of the seller	may treat the sale as void.[1]

The Condition

Laws confined to certain cases or unrestricted in operation may often be called into action only on the fulfillment of certain conditions precedent. The natural position for these is after the statement of the cases in which the law is to apply, but before the body of the law proper. Since the legal action is suspended until the conditions are fulfilled, they should evidently be placed before it, where the operation of the law will be brought into strong contrast with the conditions on which it operates.

Since there may be many conditions and normally no two will be performed at the same time, it is an advantage to enumerate them together and in their natural chronological sequence, so that he who avails himself of the law may know what is at each step the next condition to be met, and when he has fulfilled them all.

The natural verb form is the conditional. The clause usually begins with "if," or where the law is negatively stated, with "unless." As in the "case," popular usage

[1] Wis. Laws 1911, ch. 549, sec. 1684t–26, p. 683.

makes free use of the future form, such as "If there shall be no other claimant," or "If upon hearing by the board of review the amount shall have been judged excessive." Such phrases mean only "if there be" and "if upon hearing by the board of review the amount be," etc.

The use of such forms violates grammar and logic. The law speaks in the present. Each of the acts mentioned in the "conditions" is spoken of as being completed at the time when the law is to act. So far as reference to the legal action is concerned there can be no condition subsequent. The use of the future forms is therefore a contradiction in terms.

The importance of exact statement of the "conditions" does not at once appear. When a law is drafted with conditions, it is presumed that the rights, privileges, powers or obligations with which it deals are to be availed of or submitted to only within the limitations stated. If applied to rights, conditions too narrow hamper what should be the citizen's liberty; if too broad, they change his liberty into license. More often they apply to laws by which obligations may be enforced on others; if too narrow the one burdened escapes part of his responsibility, if too broad the law becomes an instrument by which one citizen can oppress another. Still more often conditions apply to laws regulating the powers of public officers and especially the powers of courts. If in this case the regulation be too narrow the arm of the court is powerless to give the needed relief, and if too great power be given, the law may be a shield for arbitrary judicial action.

Examples of the Use of "Conditions"

More than any other element of our laws the "condition" is subject to confused construction. Unfortunately our American laws furnish more examples of

the confusion of their elements than of their proper arrangement, nor is this criticism less applicable to federal than to state acts. The following law illustrates the illogical order which is almost typical of our state legislation. The cumbersome language used would fall of itself if the draftsman had visualized the object of the law and had then adopted the logical arrangement of its parts.

Cases.	Condition.	Subject.	Action.	Condition.	Action.
Whenever any bonds heretofore or hereafter issued and sold by any city, whether incorporate under general law or special act, for the construction or purchase or the erection and maintenance of an electric lighting plant, and the proceeds of which shall have been expended in whole or in part by such city in or about the construction or purchase of plant or of a site therefor shall be invalid for any reason,	and such city shall, by further proceedings subsequent to such issue, sale, and expenditure have determined in the manner provided by law to issue bonds for the construction or purchase of an electric lighting plant or for the construction of a plant for the production, transmission, delivery and furnishing of electric light for lighting streets [etc.] in the said city and for . . . . power for municipal purposes,	said invalid bonds theretofore issued and sold	shall	if ratified by a majority of the members elect of the common council of such city	be legal and binding.

The act would have accomplished as much, it is believed, and would have been stronger logically if it had been worded as follows:

Case.	Conditions.	Subject.	Action.
Whenever bonds for an electric light plant issued by a city are invalid and the proceeds have been partially or wholly expended for the purpose for which issued,	(1) if the city after the issue and expenditure determine as provided by law to issue bonds for an electric light plant or an electric light and power plant and (2) if a majority of the common council vote to ratify them	the invalid bonds	shall be binding.

A common practice but one not to be defended is to put the condition in the form of a proviso or exception. Often it is easier for the draftsman to state the legal action and then run in the qualifications at the end, but in doing so the purpose of the proviso is perverted or that is stated as an exception which is in fact a condition applying to the whole law. In the following law, for example,[1] the proviso is perverted from its proper use:

Case.	Subject.	Action.	Proviso.
(1) Where the seller of goods has a voidable title thereto but (2) his title has not been avoided at the time of the sale	the buyer	acquires a good title to the goods	provided (1) he buys them in good faith, (2) for value and (3) without notice of the seller's defect of title.

[1] Wis. Laws 1911, ch. 549, sec. 1684t-24. See explanation of proper use of proviso elsewhere.

A better arrangement would have been:

Case.	Condition.	Subject.	Action.
(1) Where the seller of goods has a voidable title thereto	(1) if the buyer buys the goods in good faith,	the buyer	shall acquire good title to the goods.
(2) but his title has not been avoided at the time of the sale,	(2) for value and (3) without notice of the seller's defect of title		

The Order of the Subject-Matter of a Bill

The order in which the parts of a law are to be stated is determined in each case by the logic of the law and by the circumstances under which it comes up for passage. Usually each law in fact consists of a number of enactments grouped together and dealing with the same subject-matter. Within each of these there is little variation in the order that should be followed. The normal sequence is "case," "conditions," "subject," "action," though many laws will not have all these elements.

How greatly the work of the legislature which debates a bill is facilitated by proper arrangement of the subject-matter is not appreciated. When a bill is a tissue of interwoven sentences with dependent clauses, exceptions and provisos taking the place of a straightforward statement, any amendment is difficult because its effect is not easily seen. When the law is properly drawn an amendment easily finds its place. If an additional "case" is to be included, it falls in its logical order with the other "case" provisions, a new "condition" is put in among the others at the point where the time of its

performance requires. If the law is too wide, the legal subject, if it stands out clearly, as it should, can be modified, and if the command of the law, the legal action, is to be changed, it can be done without so detailed a study of the inter-relations of the parts of the bill. If the parts of the bill are kept distinct and in their logical order much of the time now spent in debate because the "drive" of the bill is not clear would be saved. Criticism would be easier, but so would defense. The good bill would speak its intent more clearly and the shady measure could less easily conceal its character. Many a bad bill slips through disguised in a costume of studied disorder. Many a good bill, too, fails because of its lack of form. If all bills are brought to good literary expression, a step of great importance will have been taken toward insuring that the laws themselves will be good. The substance of good legislation depends upon its form more than is usually realized.

After a bill is an act and takes effect on the rights of citizens the importance of good arrangement continues to be felt. Imagine a case in which the law is to be put into operation. The person who obeys the law or wishes to take advantage of its provisions knows at once from the "case" whether the act he is reading is one which covers his state of facts. If it does not he must seek another law. By reading the "conditions" he knows just what he must do or must not do to have the law operate for him or to keep himself free from its provisions. Then the subject and action tell what, under the case and conditions, he or someone else must do or allow to be done. For example, a man makes a complaint to a court under a certain law. In doing so he alleges that a certain case has arisen — using the words of the statute to describe it. He declares that he has fulfilled the conditions on which the rule should apply. The person against

whom the complaint is made on his side has only to show, to upset the proceedings, that the case is other than that provided for in the law or that the conditions on which the rule is to apply have not been fulfilled.

In the legal subject the parties to the dispute find to whom they should go for a settlement. The court to which the complaint is made finds whether the law confers the authority to act under the case and conditions that have been proven to exist. The legal action tells what must be done. There the parties look to determine their rights and obligations under the law, and the court in its decision gives its judgment by using the very words of the law. The clear statement of the law makes it, in a word, easier to obey and easier to enforce. The statement of the example is of course much simpler than the fact, but there is hardly need of proof that failure to follow the logical order in the arrangement of the subject-matter makes more difficult the work of all parties to whom the law applies.

The order of the different enactments in a bill is subject to no hard and fast rule. In the normal measure of non-partisan character the controlling influences should be the convenience of those who must obey and administer the law. If several things are to be done in a certain order the enactments that require them should follow that order. Permanent provisions of a general character should come first. Dependent clauses should follow those on which they depend. Formal matters should be put later in the bill; details should be put in forms or schedules, preferably at the end. Temporary provisions should be grouped together so far as the subject-matter allows.

On the other hand, political influences may justify warping a bill out of its usual sequence. When a measure

involves a principle which is likely to be attacked during passage it may be best to put that proposal first so as to concentrate attention on the main contentious issue to enable the rallying of the entire party to the support of the measure. If formal details precede, the debate may bring out minor differences of opinion which split the support of the bill and make difficult a later agreement as to general policy. If the main object is agreed upon first, the adjustment of details will seldom offer serious difficulties.

CHAPTER VIII

LANGUAGE OF STATUTES

PLAINNESS AND UNIFORMITY, MANDATORY AND DIRECTORY LANGUAGE

In General

The meaning of a statute must be found within its four corners. There is no proper way in which the courts which interpret or individuals who obey the laws can broaden or narrow their express declarations. It is therefore essential that the draftsman should make the law clear, concise, exact. Language should be used, as far as possible, in the ordinary sense and if it is otherwise used the intent so to do should plainly appear. Care should be taken to use the same words always with the same meaning, for though the courts may recognize different meanings for the same words in different parts of the statute,[1] those who must obey the law will find it easiest to do so when no detailed comparison with the context is necessary to determine the legislative intent. The standard of uniformity of meaning should be kept, indeed, not only throughout the individual act but in all laws in which the terms appear. Otherwise the law when put in a revision becomes for the layman as unclear as if words had different meanings in different parts of the same act.

Where the language is uniform and exact, the intent will be clear, the citizen will know what the rule requires,

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[1] See *Louisville & N. R. Co.* v. *Gaines*, 3 Fed. 266 (U. S. 1880). But see *Green* v. *Weller*, 32 Miss. 650 (1856).

the judge will not have the duty to reconcile contradictory terms nor be forced to judicial legislation by ambiguous provisions. Intent will, it is true, control language [1] and grammatical construction, where intent can be ascertained, and thus the courts may partly remedy the wrong done by careless legislation, but the court should not be called upon to do the work of the legislature. Not a little of our judicial legislation is due to the faults of the legislatures rather than those of the courts. If the law is properly drawn there will be but little necessity of ascertaining its meaning by construction,[2] with the attendant possibility of its defeat. The determination of what the law means is always difficult, due to the accumulation of laws from different authors and from different sessions. It is rendered infinitely more difficult when careless phraseology makes the meaning of the individual statute unclear.

The rules which the courts have adopted for the interpretation of the language of statutes furnish not only guide posts for the law interpreter but warnings and prohibitions which must be carefully studied by the lawmaker. It is of prime importance, in choosing language for statutes, to remember that if the language of the law is clear and plain, courts of justice have no authority, because of evil consequences which would result, to give it a construction different from its natural and obvious meaning. Considerations of evil and hardship will not change the statute when its language is unambiguous. If the bill is exact, it leaves no room for judicial legislation under the guise of an effort to ascertain the legislative intent.

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[1] *State* v. *Myers*, 44 N. E. 801 (Ind. 1896); *State* v. *Scaffer*, 104 N. W. 139 (Minn. 1905); *Fremont E. & M. V. Ry.* v. *Pennington County*, 105 N. W. 929 (S. D. 1905).

[2] *U. S.* v. *Ninety-Nine Diamonds*, 139 F. 961 (Minn. 1905).

Mandatory and Directory Language

A prime essential for good lawmaking is that the legislator should keep clearly in mind whether he intends to command or to lay down only optional rules for the guidance of those who are to obey the law. There is no way in which the intent of the law may be more easily defeated than by the use of language which leaves in doubt whether the rule was intended as imperative. Instances of this abuse have become increasingly frequent in recent years. Careless use of words has forced the courts to extend the rules of construction to ascertain the will of the legislature, and the process once begun has continued until now the rules of construction often seem to be extended to defeat rather than to ascertain what the law was intended to mean. The fault lies not alone with the courts. Words which in ordinary use have a definite meaning because of careless drafting of laws have ceased to have it in our statutes. Words like "may," "must" and "shall" are constantly used in statutes without intending that they shall be taken literally. The courts are forced thus to arrive at "the object evidently designed to be reached"[1] by the use of arbitrary standards. But a set of hard and fast rules can give a uniform interpretation of intent only when the terms used are used uniformly. When they are used carelessly, sometimes with one intent, sometimes with another, the rules of construction may serve to give them a definite meaning, but they do not give us the assurance that what the law intended has always been ascertained. The duty to change the meaning of terms which has been forced on the court in doubtful cases by poor lawmaking has led to an increasing use of the power. What a marked change this practice has brought in the

[1] *Fields* v. *U. S.*, 27 App. D. C. (433), (1906).

attitude of some of our courts is shown by the contrasted holdings as to when a statute is to be held directory and when mandatory.

An early Maryland decision lays down the unqualified rule that "where a statute to attain a particular object *prescribes the mode of proceeding to enforce it, such mode must be pursued.*"[1] The earlier cases show a general prejudice against the exercise of a power to hold laws directory. There were a number of cases, later discussed, in which permissive statutes relating to the duties of public officers were held mandatory, but cases were rare indeed where the court attempted to hold other statutes imperative in form, to be directory only.

"To say that a statute is 'directory,' " says the Supreme Court of Mississippi as late as 1871 but voicing the earlier opinion, "approaches so near legislative discretion that this rule of construction ought to be applied by the courts with reluctance, and only in extraordinary cases where great public mischiefs would otherwise occur or important private interests demand the application of the rule. Getting rid of a statutory provision by calling it 'directory' is not only unsatisfactory on account of the vagueness of the rule itself, but it is the exercise of a dispensing power by the courts. There is no more propriety in dispensing with one positive requirement than another; a whole statute may be thus dispensed with when in the way of the caprice or will of a judge . . . the public inconvenience occasioned by the want of uniformity in the mode of exercising a power is a strong reason for bridling this discretion.

"It is dangerous to attempt to be wiser than the law, when its requirements are plain and positive. The courts are not called upon to give reasons why it was

[1] *In re Hughes*, 1 Bland, ch. 46 (Md. 1825).

enacted. A judge should rarely take upon himself to say that what the legislature has required is unnecessary. He may not see the necessity of it, still it is not safe to assume that the legislature did not have a reason for it; perhaps it only aimed at certainty and uniformity. In that case the judge cannot interfere to defeat that object, however puerile it may appear. . . . It is not competent to the (judiciary) to dispense with a regulation or requisition plainly prescribed, . . . or to say that this mode, that, or the other is as good as the one dictated by the legislature; for this in fact would be placing the judiciary above the legislature by enabling the former to nullify the acts of the latter." [1]

Many of our courts have gone far from this standard. In some the presumption that a law is mandatory seems to be almost reversed for large classes of cases. A Texas court declares, "a clause in a statute is directory where it contains mere matters of direction and is not followed by words of positive prohibition." [2] In Missouri, "Whether a statutory requirement is mandatory or directory depends upon its effect. If no substantial rights depend on it and no injury can result from ignoring it and the purpose of the legislature can be accomplished in a manner other than that prescribed and substantially the same results obtained, then the statute will generally be regarded as directory." [3]

Between these two points of view lies much of the confusion which creeps into our interpretation of mandatory and directory laws. Are the courts to step in to

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[1] *Koch* v. *Bridges*, 45 Miss. 247 (1871).

[2] *Gomez* v. *Timon*, 128 S. W. 656 (Tex. Civ. App. 1910).

[3] *Granite Bituminous Paving Co.* v. *McManus*, 129 S. W. 448 (Mo. App. 1910). To the same effect, *Hurford* v. *City of Omaha*, 4 Neb. 336 (1876); *People* v. *Allen*, 6 Wend. 486 (N. Y. 1831).

declare directory, provisions of law mandatory on their face, merely because they are considered immaterial or because the intent of the legislature can be accomplished as well in another way; or should mandatory language be construed as mandatory, throwing back on the legislature the duty of saying what it means? No doubt the courts have been led to change the meaning of the terms in the belief that the law would otherwise destroy rights which ought to be protected, but it is doubtful whether preserving the right in the individual case has not led to a greater wrong by making doubtful the rule which, if sustained, would have removed the necessity for construction and would have forced the legislature to use words of command only, when an invariable rule is needed and wanted. When the courts enter upon the "construction" of laws to the extent of holding directory provisions mandatory or the reverse it may well be doubted whether "construction" has its technical or its popular meaning.

Meaning of "May" and "Shall"

Besides the general standards set by the courts for determining whether laws will be held mandatory or directory there are a large number of cases which interpret particular words as mandatory or directory in force. The decisions do not define any clear standard for their use in laws, even though their meaning in the grammatical sense be free from doubt.

"May" and "shall" do not always have their ordinary meaning when used in laws, but in many cases may be used interchangeably. The court will undertake to give the words permissive or imperative force "according to the intent of the legislature." Though this standard is one which in the ordinary case brings no abuse, there are many cases where the court introduces

rules by which broad classes of laws are held directory not because the legislative intent appears in the law itself to require it, but because "no injury can result from ignoring" the mandatory character of the law or "no substantial rights depend on it." Similarly a permissive statute may become mandatory.[1]

When "May" is Directory

The popular and grammatical meaning of "may," in which it expresses liberty or permission to do a thing or refrain from doing a thing, is still its meaning in law when it clearly appears that the legislature so intended.[2] A recent New York case gives an even narrower rule: "Where neither the clear intent of the legislature nor public policy requires that the language of a statute be given a mandatory construction the word 'may' is not equivalent to 'must.'"[3]

When "May" is Mandatory

Judicial interpretation has built up a long list of conditions under which "may" will be held to mean "shall" or "must." The same standard is not reached throughout the country, but the extent of uncertainty which has been introduced in the law will be indicated by the following classes of holdings, which are, as is easily seen, neither exhaustive nor exclusive:

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[1] Examples of the interchangeable use of "may" and "shall" are: *State* v. *School Dist.*, 103 P. 136 (Kan. 1909); *Rothschild* v. *New York Life Ins. Co.*, 97 Ill. App. 547 (1901); *Boyer* v. *Onion*, 108 Ill. App. 612 (1902); *Leighton* v. *Maury*, 76 Va. 865 (1882); *Fowler* v. *Pirkins*, 77 Ill. 271 (1875). See also, cases cited below.

[2] *Harrison* v. *Wissler*, 98 Va. 597 (1900); *Vigo Co. Com'rs* v. *Davis*, 36 N. E. 141 (Ind. 1894).

[3] *Town of Hempstead* v. *Lawrence*, 122 N. Y. S. 1037 (1910).

"May," it is now quite generally settled, is imperative when used in referring to a grant of authority or power to a public officer to do a certain act which involves the "public interests" or "individual rights,"[1] or where the construction is required by "justice" or "public duty,"[2] or where the public alone has an interest.[3] "May" is imperative in remedial statutes,[4] and when it must be so construed for the purpose of sustaining or enforcing a right but never for creating one,[5] or where "common fairness and the rights of the parties litigant demand" that it should be so construed.[6]

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[1] *Ralston* v. *Crittenden*, 13 Fed. 508 (U. S. 1882); *Queeny* v. *Higgins*, 114 N. W. 51 (Iowa 1907); *State* v. *North Shore Boom & Driving Co.*, 103 P. 426 (Wash. 1909); *McConnell* v. *Allen*, 105 N. Y. S. 16 (1907); *Binder* v. *Sanghorst*, 85 N. E. 400 (Ill. 1908); *Cutler* v. *Howard*, 9 Wis. 309 (1859); *State* v. *Grubb*, 85 Ind. 213 (1882); *People* v. *Otsego Co. Supervisors*, 51 N. Y. 401 (N. Y. 1873); *Springfield Milling Co.* v. *Lane Co.*, 5 Or. 265 (Or. 1874); *State ex rel Jones* v. *Laughlin*, 73 Mo. 443 (1881); *People* v. *Buffalo Co. Com'rs*, 4 Neb. 150 (1875); *Skinner* v. *Tibbitts*, 13 Civ. Proc. R. 370 (N. Y. 1888); *Minor* v. *Mechanics Bank*, 26 U. S. 46 (1828); *Traders Mutual Life Co.* v. *Humphrey*, 69 N. E. 875 (Ill. App. 1904); *Gray* v. *State*, 72 Ind. 567 (1880); *State ex rel Vernon County* v. *King*, 136 Mo. 309 (1896); *State* v. *Barry*, 103 N. W. 637 (N. D. 1905); *Jordan* v. *Davis*, 61 P. 1063 (Okl. 1900). This is the meaning given "may" in such cases in England also. See Interpretation Act of 1889.

[2] See for various similar phraseology: *Whitley* v. *State*, 68 S. E. 716 (Ga. 1910); *Deming* v. *Metropolitan Engineering & Construction Co.*, 136 S. W. 740 (Mo. App. 1911); *Apollo Borough* v. *Clepper*, 44 Pa. Super. Ct. 396 (1910); *Ex parte Banks*, 28 Ala. 28 (Ala. 1856); *Mitchell* v. *Duncan*, 7 Fla. 13 (1857).

[3] *Kane* v. *Footh*, 70 Ill. 587 (Ill. 1873).

[4] *State* v. *North Shore Boom & Driving Co.*, 103 P. 426 (Wash. 1909).

[5] *State ex rel Kyger* v. *Holt County Court*, 39 Mo. 521 (Mo. 1867).

[6] *Chicago W. & V. Coal Co.* v. *People*, 114 Ill. App. 75 (1904).

When "Shall" is Mandatory

Though "shall" no longer has a uniform legal meaning it is still presumed to be imperative.[1] If a different interpretation is sought it must rest upon the intent of the legislature as elsewhere shown in the bill or upon "the character of the legislation."[2]

When "Shall" is Directory

There is an apparently increasing tendency to hold that "shall" in many cases means only a grant of power but not a command. Curiously enough, though the interpretation of "may" tends to increase the obligations of the persons bound by the law, especially if they be public officers, the interpretation of "shall" tends toward cutting down those duties. Typical examples of the way in which the meaning of the imperative "shall" has been softened by the courts are the following:

1. A statute specifying the time within which a public officer must perform an act regarding the rights or duties of another is directory merely unless the nature of the act or the words of the statute show that it was intended as a limitation of power.[3] A law requiring that "the commissioners *shall* return the assessment roll within forty days" is directory merely.[4]

2. Where the directions of a statute are given with a view to the proper, orderly and prompt conduct of business merely, the provision may generally be regarded as directory.[5]

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[1] *Board of Finance* v. *Peoples' National Bank*, 89 N. E. 904 (Ind. App. 1909).

[2] *Haythorn* v. *Van Keuren & Son*, 74 A. 502 (N. J. Sup. 1909.)

[3] *St. Louis County Ct.* v. *Sparks*, 10 Mo. 117 (Mo. 1846).

[4] *Wheeler* v. *City of Chicago*, 24 Ill. 105 (1860). See also, *People* v. *Lake Co. Sup'rs.*, 33 Cal. 487 (1867).

[5] *Hurford* v. *City of Omaha*, 4 Neb. 336 (1876); *People* v. *Allen*,

3. Where a statute directs certain proceedings to be taken in a certain way and the form does not appear to be essential, the law will be held as directory and the proceedings under it valid though the command of the statute as to form has not been strictly obeyed; the manner of doing not being the essence of the thing to be done.[1]

A statute requiring that a certain order "shall be posted up at the court house door ten days before its commencement," is directory merely, and a notice of eight days may be sufficient.[2]

Various Mandatory and Directory Phrases

The necessity of great care in using mandatory and directory language in statutes is not confined to the usual words "may" and "shall." The same limitations apply to many other phrases of apparently definite meaning. For example, a statute by which a board of officers is "authorized and empowered" to hear and determine a class of applications does not given them a discretion to hear or not. It is mandatory.[3] "The power to levy all needful taxes" imposes the duty to provide for any local object for which the legislature has provided.[4] Where a city council may, "if it believes the

6 Wend. 486 (N. Y. 1831). Other examples where "shall" is held equivalent to "may" are found in: *In re Chadbourne's Estate*, 114 P. 1012 (Cal. App. 1911); *Merrill* v. *Shaw*, 5 Minn. 148 (1860); *In re Thurber's Estate*, 162 N. Y. 244 (1900); *First National Bank of Seneca* v. *Lyman*, 59 Kan. 410 (1898); *Cook* v. *Spears*, 2 Cal. 409 (1852); *People* v. *Sanitary Dist. of Chi.*, 184 Ill. 597 (1900); *Clancy* v. *McElroy*, 30 Wash. 567 (1902).

[1] *White* v. *Crump*, 19 W. Va. 583 (1882).

[2] *Blimm* v. *Commonwealth*, 70 Ky. 320 (1870).

[3] *People* v. *Herkimer Co. Sup'rs*, 56 Barb. 452 (N. Y. 1867).

[4] *Com'rs of Pub. Schools* v. *Co. Com'rs*, 20 Md. 449 (1864).

public good and the best interests of the city require it, levy a tax," it is held that it must levy the tax. "The discretion thus given," declares the court, "cannot, consistently with the rules of law, be resolved in the negative."[1] Thus an act "empowering" county commissioners to issue bonds and to levy a tax to pay them was held to be mandatory on the commissioners.[2] The same rule applies where municipalities are "authorized" to make compensation for a change of grade.[3]

It has been held even in the Supreme Court of the United States that a statute providing that certain public officers, "if deemed advisable," or "if they believe the public good and the best interests of the city require it," "may" levy a certain tax, though permissive in form, is in fact peremptory whenever the public interest or individual rights call for its exercise.[4]

Affirmative and Negative Language

It is important to bear in mind in drafting laws the rules which are followed in interpreting negative and affirmative language. Whether the law is affirmatively or negatively stated in fact is often the determining consideration upon which the court relies for deciding whether the law is directory or mandatory.

In some jurisdictions it is broadly stated that affirmative words make a statute directory and negative or exclusive words make it imperative,[5] but a broader standard is followed in most states. It is generally accepted that if an affirmative statute introductive of a new law directs a thing to be done in a certain manner,

[1] *Galena* v. *Amy*, 5 Wall. 705, 709 (1866).
[2] *Erskine* v. *Nelson County*, 4 N. D. 66 (1893).
[3] *Clark* v. *Elizabeth*, 61 N. J. L. 565 (1898).
[4] *Rock Island Sup'rs* v. *United States*, 71 U. S. 435 (1866).
[5] *Atty.-Gen.* v. *Baker*, 9 Rich Eq. 521 (S. C. 1856).

that thing cannot, even though there be no negative words, be done in any other manner.[1] Other cases hold that affirmative words may be imperative if they are absolute, explicit and peremptory, and admit the exercise of no discretion.[2] But where negative words are used the statute as a rule automatically becomes imperative,[3] and this is true even though the acts or proceedings are immaterial in themselves and though the imperative language used would otherwise be held directory.[4] Thus, statutes specifying the time at or within which an act is to be done are usually held directory unless time is the essence of the thing to be done or the language of the statute contains *negative* words, or shows in some other way that the designation of the time was intended as a limitation of power, authority or right.[5] Negative words which go to the power or jurisdiction itself have never been held to be directory only.[6]

For example, a law is passed empowering a board created by statute in a certain city to fix the salary of a named public officer. A subsequent statute provides, "No debt or contract hereafter incurred or made shall be binding upon the city of ———— unless authorized by law or ordinance and an appropriation sufficient to pay the same be previously made by councils." The

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[1] *Cook* v. *Kelley*, 12 Abb. Prac. 35 N. Y. (1861); *U. S.* v. *Case of Han Purals*, 1 Paine 406.

[2] *Koch* v. *Bridges*, 45 Miss. 247 (1871, dictum). Similar, *Byron* v. *Sundburgh*, 5 Tex. 418 (1849).

[3] *Koch* v. *Bridges*, 45 Miss. 247 (1871); *Conn. Mut. Life Co.* v. *Wood*, 74 N. W. 656 (Mich. 1897).

[4] *Hurford* v. *City of Omaha*, 4 Neb. 336 (1876).

[5] *People* v. *Lake County Sup'rs*, 33 Cal. 487 (1867); *St. Louis County Ct.* v. *Sparks*, 10 Mo. 117 (1846).

[6] *Bladen* v. *City of Philadelphia*, 60 Pa. 464 (Pa. 1869). A discussion of the advantage of using negative language is found in *Rutter* v. *White*, 90 N. E. 401 (Mass. 1910).

negative language limits the extent of the power of the city and the salary of the officer can only be fixed by the later law. If the statement had been in affirmative form the question might be raised whether the legislature had intended the new law to be exclusive and prohibitory to the degree that it would repeal the provisions of the former act as to the officers for which it provided.

Summary

In this state of the law what are the rules which the careful draftsman must follow to be sure that laws will be held mandatory or directory according to the intent of the author?

1. If the law is to be mandatory the language should be exclusive, absolute and clearly imperative in form. Affirmative language is not favored. It may, if the law is in a new field, be held imperative if it is exclusive. Negative language is preferred. It will almost automatically lead to the use of imperative forms. Where the provisions intended to be made imperative relate to form or are intended chiefly to secure uniformity, it will be safer to follow the statement of the law with an express declaration that no other way of doing the acts prescribed shall be legal.

2. If the law is to be directory only it is not safe to rely merely on an affirmative statement. The language should be permissive, not leave the right of the person who is to enjoy the privilege to exercise his discretion covered with doubt. Where the privilege is given to an individual not in official position, this is enough to insure that the law will be held directory. If the rights of the public are involved or if the discretion is to be exercised by an official, the statement that the discretion shall be preserved by the one who is to act should always be explicitly stated, since any doubtful phrase

will be construed in favor of the person calling for the exercise of the power granted. It is safest in such laws to append a clause declaring in effect, "The powers herein granted may be used or not, as the officers to whom they are granted may in their discretion determine."

CHAPTER IX

LANGUAGE OF STATUTES

UNNECESSARY AND INACCURATE LANGUAGE, GENERAL AND PARTICULAR TERMS, GRAMMATICAL CONSTRUCTION

Laws are often made needlessly complex by the repetition of series of terms when one of the series could stand for all; often too, from a desire to make the law comprehensive, lists of synonyms or pairs of conjunctions, are introduced. To some extent this latter practice may be a survival of the use of couplets in documents, a practice said to date from the time when the use of a word from the native tongue along with one from Norman French made the meaning easier to understand. In any case it is probable that the survival of expressions whose origin is thus explained, such as "act and deed," and "will and testament," has fortified the impression that a law should exhaust the synonyms which the language provides. Whether historically explainable as arising from a desire for clearness, or for greater elegance, or from the desire of scriveners paid by the line to increase the length of legal documents, the practice is not now to be defended. A law is usually stronger if it has few words, chosen with care as to their meaning. The rule is thus expressed by one who has for more than forty years been engaged in drafting laws in India and in the British Parliament: "More words should not be used than are necessary

to make the meaning clear. Every superfluous word may raise a debate in Parliament, and a discussion in court." [1]

The use of the pleonastic phrases that still encumber our statute books, and confuse the meaning of the law if they do not defeat it, is now merely a tribute to habit. There is not, as a rule, any deliberate choice in their use and they often are thrown together to save the draftsman the labor of defining exactly what he wants to accomplish.

Too great care cannot be taken to make the law explicit. No criticism is here intended of language which shows an intent to express with minuteness exact rules for situations concerning which the law would otherwise give no rule. Greater harm may often be done by a law which dismisses a complicated subject with a few sweeping rules which do injustice because of their generality than by a law which offends only because of verboseness and repetitions, but both extremes are to be avoided; in fact there is no guarantee that a loosely phrased, wordy statute which includes a host of synonyms will be in fact fitted to the complex situation with which it may deal. Length must be justified by attempts closely to define the policy of the law and to solve in advance the questions that may arise in the interpretation of the law by the people, the executive and the courts. Multiplication of clauses, sections and words by repetition, or the use of words which add nothing to the meaning, is an abuse which cannot be too strongly condemned. Often the apparently comprehensive language may serve as a cloak for an actual defeat of the intent of the law.

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[1] Sir Courtenay Ilbert, Legislative Methods and Forms, Oxford (1901), p. 247.

Number and Gender

The most common class of repetitions occurring without excuse are those which involve number and gender. Extreme examples of padding of this sort are the following:

"Sec. 3. That in case any damage or damages may have been sustained by reason of stock running at large in said districts, any justice of the peace of the county may, upon application of the person damaged, appoint three substantial freeholders to estimate the said damage or damages, which, together with the legal charges for keeping said stock, shall be paid to the person or persons claiming the same before the same is delivered."[1]

The feminine form is evidently superfluous in the following:

"Be it enacted, etc. Sec. 1. That from and after the passage of this act each and every inmate of each and every insane asylum, both public and private, . . . shall be allowed to choose one individual from the outside world to whom he or she may write when and whatever he or she desires, and over these letters there shall be no censorship exercised or allowed by any of the asylum officials or employees; but their post-office rights shall be as free and unrestricted as are those of any other resident or citizen of the United States, and shall be under the protection of the same postal laws; and each and every inmate shall have the right to make a new choice of this individual party every three months, if he or she so desires to do . . ."[2]

It is a well-established rule that unless the character of the law calls for an exception, the singular form includes the plural and the masculine includes the

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[1] Willard, A. R. Legislative Handbook, p. 172.

[2] Willard, A. R. Legislative Handbook, pp. 173, 174.

feminine. These rules will, if observed, remove part of the needless repetitions. Courts have held too, apart from statutory authority, that "person" includes corporations[1] but not necessarily the state,[2] and "company" has been held to mean all corporations, companies, firms or individuals.[3]

Occasionally, however, where the exercise of certain privileges has been confined to males, it is safer to specify both genders. For example, the question was raised before the Wisconsin Supreme Court whether a woman could be admitted to practice at its bar under a statute which required that before an applicant could act "he" must be licensed by the court. The court refused to follow the usual rule of construction "in view of the universal exclusion of females from the bar and in the absence of any other evidence of a legislative intent to require their admission."[4]

Pairs of words often needlessly pad the laws. Examples of some of frequent occurrence are the following: "Authorize and empower"; "each and every"; "each and all"; "by and with the authority"; "order and direct"; "desire and require"; "full and complete"; "from and after." The word "such" appears *ad nauseam* in hundreds of our laws, otherwise examples of good draftsmanship. It is unnecessary, probably nine times out of ten; "each" and "any" are usually unnecessary, and "the same," "aforesaid" and "before mentioned" can usually be avoided by slight changes in phraseology.

A measure of improvement can also be gotten through the passage of Interpretation Acts. The first step

[1] *Aldrich* v. *E. W. Blatchford & Co.*, 56 N. E. 700 (Mass. 1900); *Norwich Pharmacal Co.* v. *Abaly*, 113 N. W. 963 (Wis. 1907).

[2] *Banton* v. *Griswold*, 50 A. 89 (Me. 1901).

[3] *Efland* v. *Southern Ry. Co.*, 59 S. E. 355 (N. C. 1907).

[4] *In re Goodell*, 39 Wis. 232 (1875).

toward laws of this sort was Lord Brougham's Act,[1] passed by Parliament in 1851, now superseded by the Interpretation Act of 1889. The desire to escape from repetitions had built up a bulky mass of definitions of terms which had to be repeated in each new law, since their application was not uniform. The law of 1889 generalized definitions which had been of frequent occurrence and made them apply uniformly to all subsequent legislation, if there were no expressed contrary intent. The law was to some extent made retroactive. These general rules of construction helped to shorten and make more intelligible the language of enactments.[2]

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[1] 13 and 14 Vict. c. 21 (1851).

[2] The scope of the Interpretation Act of 1889 is indicated by the following summary of its sub-titles:

THE INTERPRETATION ACT, 1889.
(52 & 53 Vict. c. 63.)

Arrangements of Sections.

RE-ENACTMENT OF EXISTING RULES.

1. Rules as to gender and number.
2. Application of penal Acts to bodies corporate.
3. Meanings of certain words in Acts since 1850.
4. Meaning of "county" in past Acts.
5. Meaning of "parish."
6. Meaning of "county court."
7. Meaning of "sheriff clerk," etc., in Scotch Acts.
8. Sections to be substantive enactments.
9. Acts to be Public Acts.
10. Amendment or repeal of Acts in same session.
11. Effect of repeal in Acts passed since 1850.

NEW GENERAL RULES OF CONSTRUCTION.

12. Official definitions in past and future Acts.
13. Judicial definitions in past and future Acts.
14. Meaning of "rules of court."
15. Meaning of "borough."
16. Meaning of "guardians and union."
17. Definitions relating to elections.

Many of the American states have adopted the same expedient, but without reaping the same advantage. In England the adoption of a statute of the kind mentioned, even though it was only of directory force, brought at once a great improvement because, since practically all the laws were drafted in a public department, they were drawn always with an eye to the direction of the statute. The practical convenience of uniformity of the meaning

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18. Geographical and Colonial definitions in future Acts.
19. Meaning of "person" in future Acts.
20. Meaning of "writing" in past and future Acts.
21. Meaning of "statutory declaration" in past and future Acts.
22. Meaning of "financial year" in future Acts.
23. Definition of "Lands Clauses Acts."
24. Meaning of "Irish Valuation Acts."
25. Meaning of "ordnance map."
26. Meaning of "service by post."
27. Meaning of "committed for trial."
28. Meanings of "sheriff, "felony," and "misdemeanor," in future Scotch Acts.
29. Meaning of "county court" in future Irish Acts.
30. References to the Crown.
31. Construction of statutory rules, etc.
32. Construction of provisions as to exercise of powers and duties.
33. Provisions as to offenses under two or more laws.
34. Measurement of distances.
35. Citation of Acts.
36. Commencement.
37. Exercise of statutory powers between passing and commencement of act.
38. Effect of repeal in future Acts.

SUPPLEMENTAL.

39. Definitions of "Act" in this Act.
40. Saving for past Acts.
41. Repeal.
42. Commencement of Act.
43. Short title.

SCHEDULE.

of terms was itself an influence forcing the professional draftsman to accept the prescribed standard. Even the bills not drawn by Cabinet authority were brought by their authors close to the statutory standard of phraseology.

The lack of a public drafting or revising agency has made the similar American statutes of only secondary influence. They have been a guide to the court in determining the intent of the legislature but not to the drafter of bills. When each member or any person interested may draft a bill, he feels no custom or interpretation statute binding him to a certain standard — if indeed he even knows of the existence of any such rule. The growth of greater care in the wording of laws through the establishment of official drafting departments and revising agencies may, it is hoped, bring in American legislation the advantage that has been reaped from the English statute.[1]

Technical Words

The use of ordinary words in a technical sense or of technical words in a non-technical sense is to be avoided. Words other than terms of art and science are to be interpreted according to their ordinary and grammatical sense,[2] technical words are to be interpreted in their technical sense,[3] unless in each case the contrary intent be evident. Words which through judicial interpretation have acquired a well understood legislative

[1] An example of a good though largely unobserved interpretation statute is found in Part V, Vol. II, Wis. Statutes 1898, ch. 204, sec. 4971, through 4977.

[2] *Duehay* v. *Dist. of Columbia*, 25 App. D. C. 434 (1905); *Corning* v. *Board of Commissioners*, 102 F. 57 (U. S. C. C. A. Kan. 1900).

[3] *Vann* v. *Edwards*, 47 S. E. 784 (N. C. 1904).

meaning should be used only in the sense they have come to bear.[1]

Indefinite Words

A large class of words expressing the degree to which a certain character may be present in an action, the motive of the person who commits the act, or qualities that must be present in a piece of work, are to be avoided wherever possible. In almost every case where such words are used there is no objective standard by which it may be determined whether the terms of the law have been complied with or not. Under such circumstances the law will be uncertain in any case, and as a rule will accomplish less than if a definite standard were adopted even though the standard were admittedly less than the author of the law would intend to accomplish in using the indefinite language.

The frequency of the use of indefinite terms which when the law is enforced fall short of the intent of the lawmaker or outrun the intent, is due in many cases to the fact that the law is made to remove specific abuses. The general application of the terms is not seen, and the possible defects come to light only when the act is in the hands of the administrative officer or interpreted in the courts.

Words and expressions which fall in this general class are those referring to a state of mind, such as knowingly, maliciously, wilfully; words referring to what must be a matter of opinion or circumstance, such as reasonable, seasonable, due, due cause, due diligence, due notice, proper, dangerous, sufficient, competent, excessive,

[1] *"The Abbottsford,"* 98 U. S. 440 (1878); *U. S.* v. *Transmissouri Freight Ass'n,* 58 Fed. 58 (1893). *Ex parte Vincent,* 26 Ala. 145 (1855).

extreme, justly, favorable, necessary, needful; or words of degree or condition which do not permit of easy objective measurement, such as forthwith, immediate, night-time, and good standard. It is not insisted that the use of terms of this sort in the law should be dispensed with. There are cases, doubtless increasing in number, which necessitate the granting of discretionary powers, but so far as possible the lawmaker will use only words which speak for a definite, easily understood and easily ascertained standard.

Referential Words

Words such as "hereinbefore" and "hereinafter" should be avoided whenever possible. They do not make clear whether the provisions referred to are to be found in the same section or the same law. If such words find their way into compiled statutes an even wider indefiniteness may result. In addition, referential words are subject to criticism because the sections of an act are often shifted during passage through the legislature, and the clauses to which reference is made may be displaced and the law therefore become disjointed.

Conjunctive and Disjunctive Words

Care should be taken in the use of conjunctive and disjunctive words. "And," "or," "with," "but," and "provided" are apt to be used carelessly and give the law an unintended meaning. Cases are found in which the court will hold "and" to mean "or" in a statute where it is necessary to carry out the legislative intent;[1] conversely, "or" will be held to mean "and,"[2] but not in

[1] *Thomas* v. *City of Grand Junction*, 56 P. 665 (Col. App. 1899); *State* v. *Myers*, 44 N. E. 801 (Ind. 1896).

[2] *State* v. *Brandt*, 41 Iowa 593 (1875); *Sparrow* v. *Davidson*

a penal statute.[1] "Provided" has been held to mean "but" or "and";[2] "or" has been held the equivalent of "and" and "with."[3] But every effort should be made to avoid forcing the courts into such strained construction of language. Occasionally the courts have even held themselves forced to construe the language to mean the exact opposite of what it says, in order to give force to the intent of the legislature as against its declaration. "Creditor" has been held to mean "debtor,"[4] and "were not" to mean "were,"[5] but to force the court to choose thus between enforcing laws which would be ridiculous, and over-riding their terms, is indefensible and unnecessary.

The Ejusdem Generis Rule

Care must be taken in statutes when an enumeration is given of the various persons or things to which a rule is to apply. If a statute is to apply to a class generally, it is safest to name the class in general terms rather than to mention particular cases followed by general language. If this is not done the courts will apply the rule of interpretation that the general words used were intended to be restricted by the particular words. This is what is known as the *ejusdem generis* rule. Though

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College Trustees, 77 N. C. 35 (1877); *State* v. *Tiffany*, 87 P. 932 (Wash. 1906); *Ransom* v. *Rutherford Co.*, 130 S. W. 1057 (Tenn. 1910).

[1] *U. S.* v. *Ten Cases of Shawls*, Fed. Cas. No. 16,448 (U. S. 1827). But the weight of authority is that this may occur even in a penal statute, at least if it does not operate to the disadvantage of the accused. See Statutes; Dec. Dig. (Key No.) 197; Cent. Dig. 275.

[2] *Brace* v. *Solner*, 1 Ala. 361 (1901).

[3] *Ayers* v. *Chicago, etc.*, 58 N. E. 318 (Ill. 1900).

[4] *Mignogna* v. *Chiaffarelli*, 131 S. W. 769 (Mo. App. 1910).

[5] *State* v. *Louisville & N. R. Co.*, 53 So. 454 (Miss. 1910).

not controlling where its enforcement would clearly overthrow the purpose of the law elsewhere expressed, it is controlling in cases where the scope of the law is not clearly set out. Large numbers of laws are in our statute books in which there is no doubt that the use of the general terms was intended by the author to widen the scope of the law. The specific terms were, it may be, included to indicate particular cases which the experience of the legislator showed to need regulation or to give color to the general term by example, and the inclusive term was meant to furnish a *general* rule in all cases substantially similar. Under this rule such provisions must be given a narrowing force.

Unless the intent is otherwise made evident the accepted construction is that in such cases the law applies only to cases of the sorts particularly mentioned. It makes no difference whether the general terms follow or precede the particular terms, they are presumed to take their meaning from the specific cases.[1]

The rule was formerly applied with strictness in the English courts. A case reported in 1827 illustrates the extremes to which the principle led.[2] A certain John Hill was charged with bull-beating, which was alleged to be contrary to a statute setting a penalty when "any

[1] *Philips* v. *Christian County*, 87 Ill. App. 481 (1900); *Nichols* v. *State*, 26 N. E. 839 (Ind. 1891); *Brooks* v. *Cook*, 7 N. W. 216 (Mich. 1880); *State* v. *Dinnisse*, 19 S. W. 92 (Mo. 1892); *Commonwealth* v. *Israel*, 4 Leigh (Va.) 675 (1833); *In re Rouse, Hazard & Co.*, 91 F. 96 (U. S. C. C. A. Ill. 1899); *Barbour* v. *City of Louisville*, 83 Ky. 95 (1885); *Townsend Gas & Electric Co.* v. *Hill*, 64 P. 778 (Wash. 1901); *Pein* v. *Mizner*, 83 N. E. 784 (Ind. App. 1908); *Ex parte Muckenfuss*, 107 S. W. 1131 (Tex. Cr. App. 1908); *Merchants Nat. Bank of Baltimore* v. *U. S.*, 42 Ct. Cl. 6 (U. S. Ct. Cl. 1906); *Rohlf* v. *Kasemeier*, 118 N. W. 276 (Iowa 1908).

[2] *Ex parte John Hill*, 3 Carrington and Payne's Repts., 225 (1827).

person or persons shall wantonly and cruelly beat, abuse, or ill-treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, *or other cattle.*" Hill contended that a bull was not within the provisions of the statute. It was shown that a statute which mentioned "deans and chapters, parsons and vicars and *all other persons whatsoever having spiritual promotion*," did not apply to the Archbishop of Canterbury, as the words did not apply to bishops, a superior order. Therefore in this case it was contended since "the enumeration began with ox, cow and heifer, omitting bull, and concluded with other cattle, it did not include a bull, the bull and the bishop standing *in pari statu* with reference to the words of those statutes respectively." The judge accepts this argument. "Horse, mare and gelding are one class; ox, cow, heifer and steer are another class; and in my opinion the bull is not included in this act of Parliament."

The force of the *ejusdem generis* rule as applied in some of our state courts is illustrated in a recent Louisiana case. A statute provided that "every person who shall wilfully set fire to or burn, or attempt to set fire to or burn, any bridge, shed, railroad, plank road, railroad car, carriage or other vehicle, or any goods, wares or merchandise, or any stack, bale or heap of hay, fodder, grain, corn, or other produce, or any crop, etc.," should be guilty of arson. Fontenot was accused of the crime of burning the "wooden box seats of a 'merry-go-round' outfit." The state contended that this was a burning of "goods" under the above law, but the court held such a burning was not a crime in Louisiana because "while the above statute enumerates a number of different kinds of property . . . it does not mention seats of the kind in question." [1]

[1] *State* v. *Fontenot*, 36 So. 630 (La. 1904).

Due to this rule it is always safest when a general law is intended to be laid down, not to enumerate specific instances. If, for any reason, mention of certain specific cases is desirable or unavoidable, the intent that the *rule* is to be of wide application and to include all cases within the general terms, should be made clear by the language used in other parts of the bill, or better yet, by a specific declaration. Any question of limitation of the force of the bill to the cases specifically mentioned may properly be removed by a statement at the end of the section that the general term shall include all cases within its meaning and not be limited to the cases specifically stated. The purpose of the *ejusdem generis* rule is to ascertain the real intent of the lawmaker; it is not a rule of abrogation, and an express declaration which makes the intent clear when the act is judged as a whole will prevent it from over-riding other rules of construction.[1]

In some states, indeed, the courts have shown an increasing willingness to find the intent of the statute in the body of the act and to avoid applying this rule of construction where possible. In some cases the avoidance of the rule has become so marked as to amount apparently to its abrogation. A recent Pennsylvania case [2] holds that an act regulating "sales of provisions" and specifying sales "of green, salted, pickled or smoked meats, lard and other articles of merchandise used

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[1] *Ex parte Smith*, 132 S. W. 607 (Mo. 1910); *Pein* v. *Mizner*, 83 N. E. 784 (Ind. App. 1908); *Prindle* v. *U. S.*, 41 Ct. Cl. 8 (U. S. Ct. Cl. 1905); *Mertens* v. *Southern Coal & Mining Co.*, 235 Ill. 540, (1908); *Wilson* v. *People*, 99 P. 335 (Col. 1909); *United States Cement Co.* v. *Cooper*, 88 N. E. 69 (Ind. 1909); *Vassey* v. *Spake*, 65 S. E. 825 (S. C. 1909); *Kaiser* v. *Idleman*, 108 P. 193 (Ore. 1910); *State* v. *Eckhardt*, 133 S. W. 321 (Mo. 1910).

[2] *Weiss* v. *Swift & Co.*, 36 Pa. Sup. Ct. 376 (1908).

wholly or in part for food," applies to eggs. If the *ejusdem generis* rule can be thus broadened its force is almost completely destroyed. A large number of state cases tend to restrict the application of the rule far beyond the earlier practice. In the Federal courts also the rule now seems to be less relied upon as a measure of intent of the legislature than formerly.[1]

In view of the widely different practice in different jurisdictions it is not advisable to put any language in a law which may allow the application of the *ejusdem generis* rule. It may cut down the scope of the law because the intent is so lacking in clearness as to force the courts to resort to construction. As the courts have repeatedly said, where the intent is clear there is no room for rules of construction. In proportion as laws are carefully drafted the importance of the *ejusdem generis* rule will decrease.

Punctuation

The rules of grammar are presumed to have been observed by the legislature and the punctuation of a law will therefore be taken as a guide to what was intended except where the intent of the law requires a different rule. "The grammatical construction of a statute," says the Pennsylvania court, "is one mode of interpretation. But it is not the only mode and it is not always the true mode. We may assume that the draftsman of an act understood the rules of grammar, but it is not always safe to do so." [2]

[1] Compare *United States* v. *Irwin*, 5 McLean 178 (U. S. Cir. Ct. 1851); *U. S.* v. *Mattock*, 2 Sawyer, 148 (U. S. Cir. Ct. 1872), cattle includes sheep; and *Prindle* v. *U. S.*, 41 Ct. Cl. 8 (U. S. Ct. Cl. 1905).

[2] *Fisher* v. *Connard*, 100 Pa. 63, 69 (1882).

The courts have shown themselves least willing to accept the rules of grammar as proof of the intent of the legislature when the question turns upon the effect of punctuation marks. The practice in the English Parliament and in our own early legislatures gave strong support to this position. Laws were enacted in England "as read." Dwarris, speaking of the effect of this practice upon the force of punctuation, declares: "As statutes are read without breaks and stops it is not at any time clear that words belong to any particular branch of a sentence; it must be collected from the context to what they relate." [1] Lord Kenyon, C.J., declared in 1790, "We know that no stops are ever inserted in acts of Parliament or in deeds; but the Courts of Law in construing them must read them with such stops as will give effect to the whole." [2]

The attitude of the United States Supreme Court is thus stated: "Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the court will first take the instrument by its four corners, in order to ascertain its true meaning. If that is apparent on judicially inspecting it, the punctuation will not be suffered to change it." [3]

A later example shows the same attitude. In 1881 the Supreme Court of the United States was called upon to interpret a statute giving judges certain powers in vacation, among which were "to hear and determine motions, to dissolve injunctions, stay or quash executions, to make all necessary orders, to carry into effect any decree previously rendered," etc. The question arose

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[1] Dwarris, Sir F. Treatise on Statutes, London, 1848, p. 601 (2d ed.).

[2] *Doe* v. *Martin*, 4 T. R. 40, 65, 66 (1790).

[3] *Ewing* v. *Burnet*, 11 Peters 41, 53 (1837).

whether the comma between "motions" and "to dissolve" should be allowed to expand the scope of the law to include motions other than those for dissolving injunctions, to which only the law would apply if the comma were lacking. The court, through Mr. Justice Harlan, makes a clear-cut declaration for the old English rule. "While the comma after the word 'motions,' if any force be attached to it, would give the section a broader scope than it would otherwise have, that circumstance should not have a controlling influence. Punctuation is no part of the statute." [1]

When bills were not printed and the members judged of their contents only from the impression made on the ear and not on the eye, the presumption could not be strongly raised that the legislature intended the law as punctuated. The legislators did not see the punctuation and the reading might not follow it. Even after bills were printed punctuation could not properly be held a controlling element in a bill unless there was certainty that the punctuation of the bill as passed would appear in the enrolled copy. Explaining its disregard of punctuation, a Pennsylvania court asserts: "The manner in which Acts of Assembly are printed while they are upon their passage is perfectly familiar. The marks of punctuation are added subsequently by a clerk or a compositor and this duty is performed very frequently in an exceedingly capricious and novel way." [2]

Both these conditions — at first absence of printed bills and later, imperfect control over the printing of bills — were long present in the state legislatures. The state courts have for this reason followed the old rule, though its reason has largely disappeared since bills are now

[1] *Hammock* v. *Loan & Trust Co.*, 105 U. S. 77 (1881).

[2] *Commonwealth* v. *Shopp*, I Woodward's Dec. (Pa.), p. 123 (1860).

regularly placed before the members in such form that the legislature can be held responsible for them "as printed." Even where the courts still hold to the former rule the legislature in practice is coming to give more attention to punctuation than formerly, as is shown by the amendments introduced to incorporate punctuation in the texts. At best, however, less care is apt to be taken in punctuation than in any other part of bill-drafting, and the courts, with the exceptions noted later, continue to exercise complete control over punctuation whenever it is necessary to give effect to legislative intent.[1] Marks will be transposed,[2] substituted or disregarded,[3] or inserted[4] where necessary. The courts hold that where the meaning is uncertain the punctuation, like the preamble, may be consulted[5] and may determine the interpretation to be given, but that punctuation alone must not be given a controlling force. If a statute is clear it should be interpreted as punctuated, especially if it has been repeatedly re-enacted with the

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[1] *Noyes* v. *Marston*, 70 N. H. 7 (1899); *Ford* v. *Delta Pine Land Co.*, 164 U. S. 662 (1897); *Trustees* v. *White*, 48 Oh. St. 577 (1891).

[2] *Matter of Brooklyn E. R. R. Co.*, 125 N. Y. 434 (1891); *Stiles* v. *Guthrie*, 3 Okla. 26 (1895); *Manger* v. *Board of State Medical Examiners*, 45 A. 891 (Md. 1900); *State* v. *Denel*, 66 P. 1037 (Kan. 1901); *Stiles* v. *City of Guthrie*, 41 P. 383 (Okla. 1895); *State* v. *Cross*, 29 S. E. 527 (W. Va. 1898); *Mechanics & Farmers Savings Bank* v. *Commonwealth*, 108 S. W. 263 (Ky. 1908); *State* v. *Mulkey*, 59 P. 17 (Idaho 1899).

[3] *Browne* v. *Turner*, 54 N. E. 510 (Mass. 1899).

[4] *Hamilton* v. *Steamboat R. B. Hamilton*, 16 Ohio St. 428 (1867); *J. I. Case Threshing Co.* v. *Watson*, 122 S. W. 974 (Tenn. 1909); *C. M. & St. P. Ry.* v. *Vollkeer*, 129 Fed. 522 (U. S. C. C. A. Iowa 1904).

[5] *Commonwealth* v. *Kelley*, 58 N. E. 691 (Mass. 1900); *Greenough* v. *Phœnix Ins. Co.*, 92 N. E. 447 (Mass. 1910).

same punctuation.[1] But punctuation has usually little force.[2]

The law and practice of a few states seem to recognize that punctuation may come to play a more important rôle. Laws have come to be spoken of as adopted "as read and printed," or "as engrossed," instead of "as read," — the former phraseology. In contradiction of the old rule, punctuation is now recognized by the New York constitution as a part of the statute. The marks included in the roll when filed with the Secretary of State are as much a part of the act as the words, under Article 3, sec. 15, of the constitution, by which a statute is enacted "as read and printed."

The present attitude of the court due to this provision is well illustrated by the following case: An act of 1894 authorized a certain board to fix salaries of members of the street cleaning department of New York City at amounts not to "exceed the following: Of the general superintendent, $3,000; of the assistant superintendent, $2,500; . . . of the hostlers, $720 each, and extra pay for work on Sundays." Between the clauses quoted are some sixteen others, each separated by a semicolon. The hostlers, from the nature of their work, are required to work on Sundays, the others do so only when occasion demands. "Each clause contains a comma separating the position named from the salary belonging to it, and is complete in itself, except that it depends for a part of its meaning upon the primary command with which the sentence opens. The words relating to extra pay are not separated from the remaining words of the clause by a semicolon, as would be expected if they applied to the preceding clauses, but by a comma, which indicates

[1] *Commonwealth* v. *Kelley*, 177 Mass. 221 (1900).

[2] *Wade* v. *Lewis & Clark County*, 24 Mont. 335 (1900).

an intention to limit their application to the clause in which they appear."[1]

A recent Maine case holds, without constitutional provision, that punctuation may be relied on to give rationality and that then "it must be considered as much as the language itself."[2]

It is still unlikely that by the constitutions punctuation will be generally recognized as a part of the law, able to control its meaning, as do the title provisions. Leaving the courts to construe the act by the rule of common sense will doubtless prove a better measure to ascertain the legislative intent than the reliance upon punctuation marks, which will continue to be especially susceptible to printers' errors.

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[1] *Tyrrell* v. *City of New York*, 53 N. E. 1111 (N. Y. 1899).

[2] *Blood* v. *Beal*, 60 A. 427 (Me. 1905).

CHAPTER X

REPEALS

A. Express Repeals

An act providing for the cancellation of a law or part of a law should contain a repealing clause indicating what part of the old rule is destroyed. A clause of this sort is not essential to the validity of the new act but it serves to make it easier to keep the law simple in form and helps to avoid uncertainty as to how far the old rule is replaced. The portions annulled should be exactly specified by title, chapter and number.

The approved position for the repealing clause, or repealer, as it is often called, is between the body of the act and the clause of taking effect. In some states it is joined with the latter either regularly, as in Arkansas, or only occasionally. The better practice is for it to stand alone.

The chief problem connected with repeals is to insure that they shall be so accurate in expression that all which is repealed shall be indicated. To the degree that this is not done, it is made difficult for the layman to find out what are his rights and obligations under the law, and the result is unnecessary litigation. In the absence of a constitutional requirement the repeal may be indicated in any way which will clearly identify the law,[1] but to fill its purpose the reference must be so pointed that there will be no doubt as to the intent of the legislature.[2]

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[1] *Leard* v. *Leard*, 30 Ind. 171 (1868).

[2] *Chegaray* v. *Jenkins*, 5 N. Y. Sup. Ct. 409 (1850); *Holt* v. *School Commissioners of Mobile*, 29 Ala. 451.

A few states have attempted to secure a greater degree of accuracy in one sort of repeals by inserting provisions in their constitutions. In connection with clauses requiring that no law shall be amended unless the new act specify the section to be amended, it is provided that the section amended shall be repealed.[1]

"The object of this provision," declares the Nebraska court, "was to give certainty to the law by removing all apparently conflicting provisions, and this was the only purpose." [2] In Nebraska the courts declare an act which covers the field of a prior act should expressly repeal the provisions which overlap. In some cases failure to do so is held to make the law unconstitutional. In almost all the other states amendments by implication are held not to be within the scope of the constitutional provisions controlling amendments. The Nebraska standard has the virtue of keeping the law clear-cut; it forces the legislator to familiarize himself with the law he is repealing. It has the disadvantage that it makes it possible that a new law may be annulled by a conflict with an old law which was overlooked, in spite of the fact that great care was used in drafting. In the other two

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[1] Kan. 2, 16 (1859); Neb. 3, 11 (1875); Ohio 2, 16 (1851).

[2] *State* v. *Wish*, 15 Neb. 448, 450 (1884). An act was passed to make it a penal offense to kill wild birds at certain seasons. A subsequent act dealing with the same subject made it a penal offense to kill wild birds at any time. Held that the last act was unconstitutional because it covered the same ground as existing law and had no clause repealing the existing law. *Sovereign* v. *State*, 7 Neb. 409 (1878); see also, *State* v. *Coff*, 44 Neb. 434 (1895). An act not complete in itself but which is clearly amendatory must set forth the sections as amended and repeal the original ones. 52 Neb. 228 (1897). But an act of February 27, 1879, is complete in itself and hence, though in conflict with prior law, is not invalid because it does not expressly repeal the prior law. *State* v. *Moore*, 50 Neb. 526.

states which have provisions similar to that found in Nebraska the courts have construed them in one case as directory only[1] and in the other have held that the clause "shall be repealed" is self-operative from the constitution and does not necessitate repetition in the act.[2]

In states other than those in which the constitution authorizes or requires the insertion of a repealer in connection with and referring to an amending act, it should not be used, as the amendment itself operates as a repeal so far as it is repugnant to the original act,[3] and if it is properly phrased it leaves no doubt as to what has been changed.

Repeals should be definite, not only so that the law may be found without extended and minute comparisons of the old with the new to ascertain what has been superseded, but also in order to make the law clear when found. This fault is met in two classes of laws in which the same field is occupied, but where it is not clear that the latter law was necessarily intended to supersede the former. In such cases it is the general rule of the courts to hold that the two acts are to stand, but the uncertainty as to whether or not in any particular case the laws actually are inconsistent is provocative of much litigation which can be avoided by carefully drawn repealers.

[1] *Lehman* v. *McBride*, 15 Ohio St. 573, 604 (1863).

[2] *Case* v. *Bartholow*, 21 Kan. 300, 308 (1878). "One purpose (of the clause) was to discontinue the practice of amendments by striking out and inserting, and another was to call specific attention to the old statute in the enactment of the new, although when the new is properly enacted with reference to the old the latter is repealed by the very force of the constitutional provision without any legislative declaration to that effect." *State* v. *Guinney*, 40 Pac. 926 (Kan. 1895). Similar, *Medical College* v. *Muldon*, 46 Ala. 603 (under constitution of 1871 replaced in 1901).

[3] *Breitung* v. *Lindauer*, 37 Mich. 217 (1877).

1. Two laws may be passed in the same field and for the same general purpose though none of their provisions expressly conflict. Duplication of this sort is often found in bounty laws for destruction of weeds or noxious animals; laws for the planting of trees or the maintenance of watering troughs on the public highways. One such law may provide for a remission of a certain amount of local taxes or the payment of a bounty by the town or county authorities to any person performing the service. A later law may provide a similar reward to be allowed by the state. But the average case where conflict of this sort arises brings up a much more complicated question of law, such as conflicts in the various grants of power to private corporations, school districts, counties, cities, and the powers of courts. It is often practically impossible to determine whether the legislature intended to make the provisions cumulative or exclusive. Frequently in such cases suits arise which could have been avoided had a proper repealing clause been used.[1]

No set type of repealer can be employed automatically to avoid this difficulty. Reliance must be had upon the assiduity of the draftsman to see to it that a repealer is used which will express exactly what the law demands. If the previous legislation providing remedies, rewards, or prohibitions in the circumstances is intended to be repealed, specific statements to that effect should be inserted. This can only be accomplished by a careful review of past legislation. Only in this way can legislation be truly progressive, leaving no broken fragments of laws behind to cumber the statute books.[2]

[1] *Smith* v. *Noble*, 35 N. W. 383 (Minn. 1887). See also, in Century Digest, Vol. 44, col. 2741 *et seq.*, list of cases of this sort brought before the courts.

[2] In practice repealers are frequently used which approach this standard. See N. Y. Laws 1910, ch. 638, prescribing a standard

An excellent example of a detailed repealing and revising statute is ch. 663, Laws of Wisconsin, 1911, consisting of eighty-four pages of provisions correcting errors, repealing expressly certain sections repealed by implication and excluding certain other sections from the statutes without affecting their validity as sections of the session laws.

Joined with the specific repealer it is often advisable to include an express declaration as to what legislation it is *not* intended to supplant. This expedient will in some cases save as much litigation as the express repealer itself. If it seems advisable, a saving clause may be added at the end which will declare the purpose of the law and prevent its extension beyond the meaning given by the legislature.[1]

Of course where the act applies to a clear-cut subject where all the conflicts which might possibly arise are easily seen, it is sufficient to name the specific clauses in connection with which questions of repeal might arise. This can be done by declaring that: "Sections —— —— are repealed and the sections —— —— shall remain of the same force as if this statute had not been passed."

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fire insurance policy: "Sec. 3: Sections fifty-seven, one hundred and forty-two, one hundred and forty-three and one hundred and sixty-two of such chapter (121) as well as all acts or parts of acts inconsistent with this act are hereby repealed."

[1] "The purposes of this act are to amend certain sections of the statutes by correcting errors therein, to repeal expressly certain sections of the statutes that have been either superseded or repealed by implication, and to exclude certain sections from the statutes without affecting their validity as sections of the session laws, for convenience in consolidation and revision of the statutes; and the act shall be interpreted as accomplishing those purposes without effecting any repeals by implication or any substantive changes of law." Ch. 663, Wis. Laws of 1911.

2. Whether a prior law is repealed by a later one is a question which often arises where one is special or local and the other general. Was it the intent of the legislature to abandon the former special law and adopt a uniform standard for the future, or was it the intent to leave the local law as still justified by the circumstances of the case and provide a uniform rule for all other cases? The absence of some definite repealer in laws of this sort causes frequent litigation and the rules which the courts have adopted give no clear statement of what will be their attitude in a particular case.

The standard usually followed is that a later general statute which in its most comprehensive sense would include that which is embraced in an earlier particular enactment does not repeal the special act [1] unless it appear from the wording of the act that the legislature intended to do so. But in many cases it is impossible from the face of the act to tell what the intent of the legislature in such a case may have been and the courts are forced to decide, almost by conjecture, a question which, had the law been explicitly drawn, need never have arisen. It is therefore imperative, if the law is to speak with the voice of command, that express repealers or declarations against repeal should be employed in cases of this nature.

Examples of the difficulty which frequently arises from careless legislation of this sort are the following:

Under a special law passed in 1890, Boyle County, Kentucky, became "dry." Under a provision of the constitution, requiring the legislature to divide the cities of the state into six classes, a law was passed in 1893

[1] *Wong Yon* v. *United States*, 181 Fed. 313 (1910 U. S. C. C. A; N. Y.). See, for a strict statement of the rule, *Trehy* v. *Marye*, 100 Va. 40 (1901).

authorizing the council in fourth class cities to regulate the sale of liquors within the city. A suit was brought, under the special law of 1890, against a man who had sold liquor in Danville, a city of the fourth class. Did the general law repeal the local one and therefore destroy the alleged grounds of suit? The court held the local law still in force. The two laws were to be read together though to do so would avoid the constitutional requirement that all cities of the same class should have the same powers and be subject to the same restrictions.[1]

On the other hand, though there was no constitutional requirement of uniformity, the Oklahoma court declares in favor of repeal in the following case: The first statute provided when the terms of the county court should be held in Wagoner county. The later statute regulated "terms of the county court in the several counties of Oklahoma." The court met as required by the special act. A conviction against James brought into court the question whether the general later act had repealed the special act. The court held that the standard above noted did not apply but that the legislature intended to provide a uniform law.[2]

Cases of this nature find their way in large numbers into our courts. Often, it is true, the explicitness of the later law makes its intent evident though no repeal of former legislation is stipulated, but in the average case much must be assumed by the court. Care on this point in the drafting of laws will remove a large amount of expensive and unnecessary litigation.

The converse case, where a former general statute clashes with a later special one, is not so difficult. The

[1] *Board of Council of City of Danville* v. *Raum*, 132 S. W. 1019 (Ky. Ct. App. Dec. 1910).

[2] 111 P. 947, *Ex parte James* (Okla. Ct. App. Nov. 1910).

uniform holding in such cases is that the latter repeals the former only as to the cases to which it applies.[1]

The form which the repealer may take in cases involving conflict of special and general acts varies with the object sought. The only unobjectionable way here, as in the case of general acts not conflicting though in the same subject-matter, is to enumerate the sections which are to be repealed or are not to be repealed. This standard is seldom approached.[2] A less explicit blanket repealer frequently used is, "All acts and parts of acts, whether special, local or otherwise, inconsistent with the provisions of this act are hereby repealed." The New Jersey courts have held this form sufficient to repeal all inconsistent local laws.[3] A better form which has been suggested is, "All acts and parts of acts, general, special or local, inconsistent herewith, are repealed."[4]

Where the intent is not to repeal the local acts it is best to insert in the repealing clause a specific statement

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[1] *City of Marshall* v. *State Bank of Marshall*, 127 S. W. 1083 (Tex. Civ. Appeals 1910).

[2] Examples of careful repealers are the following:

Laws of New York, 1910, ch. 640, sec. 28, "Limitation."

"Sections twenty-five, twenty-six and twenty-seven hereof shall apply only to cities of the first class and do not repeal or supersede the provisions of section thirty-four of the Greater New York Charter as amended by chapter five hundred and forty of the laws of nineteen hundred and nine."

Acts and Resolves of Massachusetts, 1910, ch. 545, sec. 4.

"Section seventeen of chapter ninety-two of the Revised Laws as amended by chapter three hundred and seven of the acts of the year nineteen hundred and seven and by chapter three hundred and seventy-seven of the acts of the year nineteen hundred and eight and by chapter three hundred and ninety-six of the acts of the year nineteen hundred and nine is hereby repealed."

[3] *New Brunswick* v. *Williamson*, 44 N. J. Law (15 Vroom) Reports 165 (1882).

[4] Willard, A. R. Legislative Handbook, p. 454.

to that effect, such as: "Special and local laws upon the subject-matter to which this act relates shall continue to have the same force which they would have had if this act had not been passed."

As noted above, most courts hold that, unless otherwise declared, a general law will not repeal a special one, and in jurisdictions where this standard is adopted the insertion of such a clause would be unnecessary, but since in some states this rule is not consistently followed, and since even where it is followed doubts may arise as to whether the legislature has or has not declared for repeal caution would counsel the insertion of a clause to place the point beyond conjecture.

The weakest form of repealer is that in common use in a number of states. "All acts and parts of acts inconsistent with the provisions of this act are hereby repealed." The use of such a repealer rests largely on custom. It is doubtful whether such statements add anything to the law above what the courts would hold to be the standard if no repealing clause were inserted.[1]

The occasional use of this blanket repealer is worse than its systematic disuse. An affirmative law which says nothing about repeal raises the presumption that the act was not intended to modify existing law, and an act which includes a clause of this sort raises the presumption that there is some inconsistency between the old and new rule. But the actual repeal, if any, is measured by the extent of the repugnancy in each case and the extent of the repugnancy is uninfluenced by the

[1] In Illinois and Oregon, and the U. S. Supreme Court, it has been definitely stated that the clause adds nothing. *Struthers* v. *People*, 116 Ill. App. 481 (1904); *State* v. *County Court of Matheur County*, 101 P. 907 (Ore. 1909); *Great Northern Ry. Co.* v. *U. S.*, 155 F. 945 (1907); affirmed, 28 S. Ct. 313; 208 U. S. 452 (1908).

original presumption.[1] The belief that a repeal is effected by the clause explains, however, many a case in the courts, and where the use of the clause is not a custom it should not be inserted. The courts have held that a blanket repealer does not give any greater effect to a general law for the repeal of special or local laws.[2]

In fact, though the intent of the clause is evidently to strengthen the repealing force of the law, some cases hold that it has just the opposite effect.[3] Thus a new statute which is intended as a substitute or revision of a previous one will not repeal the provisions of the former law which are not inconsistent with the new one if this clause as to repeal is inserted.[4] In summary it

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[1] *Reading* v. *Shepp*, 2 Pa. Dist. Ct. 137 (1892); *North Fowanda* v. *Bradford Co.*, 2 Pa. Dist. Ct. 517 (1893); *State* v. *Yardley*, 95 Tenn. 546 (1895); *Elrod* v. *Gilleland*, 27 Ga. 467 (1859); *State* v. *Fuller*, 14 La. An. 667 (1859); *People* v. *Van Pelt*, 90 N. W. 424 (Mich. 1902); *State* v. *Drexel*, 74 Neb. 776 (1905).

[2] *Town School Dist.* v. *School Dist.*, 72 Vt. 45 (1900); *State* v. *Carson*, 6 Wash. 250 (1893); *Southwestern Ry. Co.* v. *Grayson*, 78 S. W. 777 (Ark. 1904); *Casterton* v. *Town of Vienna*, 44 N. Y. S. 868 (1897); *State* v. *Commissioners of Public Lands*, 106 Wis. 584 (1900); *Lawyer* v. *Carpenter*, 97 S. W. 662 (Ark. 1906); *State* v. *County Court of Matheur Co.*, 101 P. 907 (Ore. 1909).

[3] *Maxwell* v. *State*, 89 Ala. 150 (1889); *Birmingham B. & L. Ass'n* v. *May, etc.*, 99 Ala. 276 (1892); *Bank of British North America* v. *Cahn*, 79 Cal. 463 (1889); *De Gravelle* v. *Iberia, etc.*, 104 La. 703 (1901); *People* v. *McAllister*, 10 Utah 357 (1894); *Pierce* v. *Commercial Investment Co.*, 30 Wash. 272 (1902).

[4] *Johnson* v. *Southern Mut. B. & L. Ass'n*, 97 La. 662; *People* v. *Van Pelt*, 130 Mich. 621 (1902); *Barden* v. *Wells*, 14 Mont. 462 (1894); *Jobb* v. *Meagher Co.*, 20 Mont. 424 (1898); *State* v. *Craig*, 22 Ohio C. C. 441 (1901); *Hurst* v. *Samuels*, 29 S. C. 476 (1887); *Co-operative G. & L. Ass'n* v. *Fawick*, 11 S. D. 589; *Cosh Murray Co.* v. *Tuttich*, 10 Wash. 449 (1895); *Holden* v. *Minn*, 137 U. S. 483 (1890); *Boyer* v. *Onion*, 108 Ill. App. 612 (1903); *State* v. *Hinton*, 22 So. 617 (1897); *State* v. *Drexel*, 105 N. W. 174 (Neb. 1905).

To the contrary: *State* v. *Carron Hill Coal Co.*, 4 Wash. 422 (1892).

may be said that though the clause is in form a repeal and is sometimes classed with express repeals,[1] the overwhelming opinion is that it effects no repeal at all. In Tennessee it has been held not to be an express repeal within the meaning of the clause of the constitution on repeals.[2] In some jurisdictions the clause even restrains the repealing force of the statute.

We may conclude that the use of a blanket repealer is unnecessary and seldom, if ever, justified. Where its use is not customary it is merely a screen behind which the careless draftsman protects himself from the labor of ascertaining the exact effect of the law he makes while at the same time he *seems* to be making it more explicit.

B. Repeals by Implication

Many states place little importance on repealing clauses. In some they occur only sporadically and even then only in general terms or in the body of the bill apparently at the point where the draftsman first became aware of the conflict with existing law.[3] Under these practices reliance must be had on repeal by implication which will abrogate statutes to the extent of actual repugnancy. This principle, it is evident, is back of all express repeals and operates to bring them up to its standard as a minimum. But the courts do not favor implied repeals. The presumption — too often contrary to fact, as our statutes show — is that the legislature acts with knowledge of all previous legislation and that if any change were intended it would be expressed.

Reliance upon implied repeals alone is a slipshod method of legislation at best. It is made least objectionable

[1] *State* v. *Kelley*, 34 N. J. L. 75, 77 (1869); *Commonwealth* v. *Churchill*, 2 Met. 118 (1840).

[2] *State* v. *Yardley*, 95 Tenn. 546 (1895).

[3] See Cal., Ia., Kan., Mass., Mich., Ohio.

when, as in many states, the repeal or amendment, which latter is usually a form of repeal, repeats the entire section of the law which is to be changed. The act to be substituted declares that the section in question is "amended," or "repealed and re-enacted so as to read as follows." [1] This expedient makes clear the portions of the previous act left out, but of course leaves uncertain what other sections of the law are intended to be affected by the new rule. That is, the new law may reach beyond the provisions of the law expressly supplanted so that it involves an implied repeal as well as one expressed. As in other repeals, the later law on its going into effect annuls all contradictory provisions of the previous ones. Contradictions cannot stand together, not only from theory but also from the nature of the case.

The rules as to implied repeals are thus summarized:

"(1) 'That the law does not favor a repeal of an older statute by a later one by mere implication.'

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[1] This form of repeal is regularly used in Maryland when the entire section is not abrogated. The following is an illustration:

CHAPTER 290.

AN ACT to repeal Section 10 of Chapter 622 of the Acts of 1908, entitled "An Act to provide for the repairs of the public roads of Calvert County," and to re-enact the same with amendments.

Section 1. Be it enacted by the General Assembly of Maryland, That Section 10 of Chapter 622 of the Acts of 1908, entitled "An Act to provide for the repairs of the public roads of Calvert County" be and the same is hereby repealed and re-enacted so as to read as follows:

Section 10. That the said Road Commissioners shall each receive from the County Commissioners one hundred ($100) dollars per annum, for the performance of the duties of this office.

Section 2. And be it enacted, That this Act shall take effect from the date of its passage.

Approved April 7, 1910.

"(2) 'The implication, in order to be operative, must be necessary, and if it arises out of repugnancy between the two acts, the later abrogates the older only to the extent that it is inconsistent and irreconcilable with it. A later and an older statute, if it is possible and reasonable to do so, will always be construed together, so as to give effect not only to the distinct parts or provisions of the latter, not inconsistent with the new law, but to give effect to the older law as a whole, subject only to restrictions or modifications of its meaning, when such seems to have been the legislative purpose. A law will not be deemed repealed because some of its provisions are repeated in a subsequent statute, except in so far as the latter plainly appears to have been intended by the legislature as a substitute.'

"(3) 'Where the later or revising statute clearly covers the whole subject-matter of antecedent acts, and it plainly appears to have been the purpose of the legislature to give expression in it to the whole law on the subject, the latter is held to be repealed by necessary implications.' " [1]

Where reliance is had on repeals by implication a negative construction of language is to be preferred. Affirmative statutes have just as great repealing force to the extent that the repugnancy to former statutes is evident, but the contradiction when affirmative language is used is often not plain. Negative language is considered exclusive, prohibitory and mandatory. Thus a law declaring "*no* prize-fight shall take place" abrogates all previous licenses on conditions and an act that "*no* beer shall be sold" revokes all previous legislation permitting it.

The same exclusive character is found in many affirmative laws. To follow the above examples, laws

[1] *Winslow* v. *Morton*, 118 N. C. 486 (1896).

providing that "all prize-fights are prohibited," or "any selling of beer shall be punished," are as wide in extent as laws with negative language, but affirmative provisions do not necessarily deny affirmative provisions on the same subjects in other statutes. If the intent is clear to limit the action altogether or to a certain manner, the affirmative language is held to embrace an exclusive, negative intent, but there is no presumption of negative intent raised by affirmative laws. A statute without negative words, it is generally accepted, will not repeal existing statutes unless there be unavoidable repugnancy. In a statute with negative words those words themselves tend to establish the repugnancy. Thus a law may provide that the hunting season for certain sorts of game shall be from November first to January first, — a rule which would not necessarily be in conflict with a prior law establishing a spring hunting season. On the other hand if the law declares that no hunting shall be lawful except during a specified season the language admits of only an exclusive construction.

C. Repeals by Lapse of Time

In Anglo-Saxon countries laws are presumed to be enacted for all time unless the contrary is expressly stated. Hence there is no repeal due to a long lapse of time during which the law was never used. A few holdings to the contrary are found even in England. An English statute of 1346 requiring oaths in certain cases was considered obsolete in 1829. A statute of 1413 required that no members be elected to Parliament except residents of the districts from which they were returned. Though unrepealed, custom was held to have effected a repeal.[1] Against an act of Parliament of 1705 a

[1] Sec. 1 Hen. V, ch. 11, repealed 14 Geo. III, ch. 58, but in practice long unobserved before that time.

contrary practice of no more than seven years was allowed to prevail.[1]

The general English theory is to the opposite effect, as is illustrated by the case of *Ashford* v. *Thornton*,[2] arising in 1818. After centuries of disuse an appeal was made to the right of trial by battle. It was held that the law had not become dead on that account and apparently the courts were only freed from the necessity of proceeding under the law because one of the parties to the suit fled the country.

A few cases in American state courts hold that repeal may arise by long adverse custom or non-user,[3] and the United States courts have upheld a custom as against a previous law where the former was "so uniform and notorious that the assent of the authorities might fairly be presumed."[4] But the prevailing holding is that a statute cannot become obsolete by disuse or contrary custom,[5] though a long disuse of a *penal* statute may justify the court in softening the provisions within the limits of its discretion. Lifeless fragments of laws, which remain after repeated repeals of their various other branches, must evidently be treated as repealed though they actually disappear only on revision of the statutes.

[1] For a discussion from which these facts are drawn, see *Snowden* v. *Snowden*, 1 Bland (Md.) 551, 555.

[2] *Ashford* v. *Thornton* (1818), 1 Bar. and Ald. 405.

[3] *Hill* v. *Smith*, Morris 70 (Iowa 1840); *O'Hanlon* v. *Myers*, 10 Rich. L. 128 (S. C. 1856); *Watson* v. *Blaylock*, 2 Mills (S. C. 351); *Canady* v. *George*, 6 Rich. Eq. 103 (1853).

[4] *Adams* v. *DeCook*, Fed. Cas. 51 (1858), (McAll. 253); affirmed in *Adams* v. *Norris* (1862), 64 U. S. 353.

[5] Recent cases on this point are: *Costello* v. *Palmer*, 20 App. D. C. 210 (1902), holding nonuser of Act of Congress of 1874 did not work repeal; and *State* v. *Nease*, 80 P. 897 (Ore. 1905), holding forty years nonuser not to be a repeal.

D. Repeal by Revision

Revision of statutes implies their review with the purpose of dropping the superfluous portions. Consequently the general rule is that whatever is omitted from the revised act is repealed. The revised act displaces the former one whether it be to the same effect or of greater or less scope. The same result is accomplished in many states which amend acts by "re-enacting" them "to read as follows." Unlike ordinary amendments then, a revision repeals by implication the previous statutes on the subject even though there be no repugnancy.[1] There is no need of an express repealing clause so far as the act revised is concerned. The presumption that repeal is implied is sufficient. The portion that is re-enacted in the revision has continuous operation but all else falls.

The difficulty with acts of this sort is not to determine their effect but to know whether in any particular case an act *is intended* as a revision of all other acts on the subject or not. Where an act declares itself a revision and the body bears out the claims of the title, it is clear that the rules should apply.[2] But the intent of the legislature in a revising act is not always clear.[3] It may be to revise certain of the laws on the subject

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[1] *Mack* v. *Jastrow*, 58 P. 372 (Cal. 1899).

[2] *U. S.* v. *Bowen*, 100 U. S. 508 (1879); *Cambria Iron Co.* v. *Ashburn*, 118 U. S. 54 (1886); *U. S.* v. *Lacher*, 134 U. S. 624 (1890); *State ex rel. Gaston* v. *Shields*, 130 S. W. 298 (Mo. 1910). But a contrary rule seems to be followed in Louisiana, *Miller* v. *Mercier*, 3 Martin (N. S.) 236, and the Minnesota Supreme Court declares that there is no presumption that revised statutes are intended to alter the existing law. *In re Lockey's Estate*, 128 N. W. 833 (Minn. (1910).

[3] *Chichester* v. *N. H. Fire Ins. Co.*, 46 A. 151 (Conn. 1900); *Combs* v. *Nelson*, 91 Ind. 123 (1883); *Commonwealth* v. *Carter*, 55 S. W. 701 (Ky. 1900); *Meriwether* v. *Overly*, 129 S. W. 1 (Mo. 1910).

and have the new act stand as a supplement to some others. In all such acts the intent should be clearly expressed by the draftsman so that the courts may not be confronted with doubt as to whether the legislature meant to make the new act the whole of the law on the subject.

E. Repeal of Repeal

The common law rule as to the effect of repealing a repealing statute is that the original act revives, and this is true even though the repeal is only one by implication.[1] In the United States, constitutions and general statutes have modified that standard. In many state constitutions the language used is to the effect that no law shall be revived, altered or amended by reference to its title only, but the act revived and sections altered shall be enacted and published at length.[2]

In some states it is maintained that these rules as to revival do not apply to the rules of the common law and that when a statute changing them is repealed the former common law rule at once comes into force again,[3] but the constitutional rule would apply where only acts of the legislature were involved.[4] A repeal of the

[1] See discussion, *Baum* v. *Thoms*, 50 N. E. 357 (Ind. 1898), and cases cited.

[2] Ala. 45; Ark. 5, 23; Cal. 4, 24; Col. 5, 24; Fla. 3, 16; Ida. 3, 18; Ill. 4, 13; Ind. 4, 21; Kan. 2, 16; Ky. 51; La. 32; Mich. 4, 25; Miss. 61; Mo. 4, 33 and 34; Mont. 5, 25; N. D. 64; Neb. 3, 11; Nev. 4, 17; N. J. 4, 7, 4; Ohio 2, 16; Okla. 5, 57; Ore. 4, 22; Pa. 36; Tex. 3, 36; Utah 6, 22; Va. 52; Wash. 2, 37; W. Va. 6, 30; Wyo. 3, 26. Similar provisions in Ga. 3, 7, 17, Md. 3, 29 and Tenn. 2, 17.

[3] *Baum* v. *Thoms*, 50 N. E. 357 (Ind. 1898).

[4] *Yolo County* v. *Colgan*, 64 Pac. 403 (Cal. 1901), and *Grand Rapids and I. R. Co.* v. *Cheboygan Circuit Judge*, 123 N. W. 591 (Mich. 1909).

repealing act would not under these constitutions work revival of a statute.[1] Lacking regulation by constitution or law, the common law rule as to revival applies even when only statutes are in question.[2]

In many states a general statute law has been relied upon to raise a barrier against implied revival, but in some, as in the case of constitutional provisions, the limitation applies only to revivals of previous acts of the legislature and not to revivals of the common law.[3] No distinction is made between revivals due to express and to implied repeals of repealing acts of the legislature.[4] Further, when the repealing act is passed with the intent of substituting another law the question of revival does not arise.[5] But where the act repealed merely removes a law which made an exception to a former general law the courts hold that the law constituting an exception was not itself a repealing act but only a suspension of the general law for that case, and therefore the repeal of the exception makes the general law applicable notwithstanding a statute against implied revival.[6]

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[1] But to the contrary, see a decision by Sup. Ct. of New Jersey, *Wallace* v. *Bradshaw*, 54 N. J. L. 175 (1891), and similar, *Zickler* v. *Union Bank, etc.*, 104 Tenn. 277 (1909).

[2] *Chard* v. *Holt*, 32 N. E. 740, 741 (N. Y. 1892). Section 82 of ch. 427 of laws of 1855 was by express repeal abrogated by sec. 1, ch. 285, laws of 1862. Sec. 1, ch. 280, laws of 1870, repealed the latter. Held that the law of 1855 revived. New York courts hold, however, that a general law is enough to prevent automatic revival. *People* v. *Steuben County*, 75 N. E. 1108 (N. Y. 1905).

[3] So in *State* v. *Sawell*, 83 N. W. 286 (Wis. 1900); see also, *Rice* v. *Commonwealth*, 22 Ky. L. R. 1793 (1901).

[4] *Milne* v. *Huber*, Fed. Cas. 9617 (1843).

[5] *Commonwealth* v. *Churchill*, 2 Met. 118 (1840).

[6] *State* v. *Sawell*, 83 N. W. 296 (Wis. 1900); *Dykstra* v. *Holden*, 115 N. W. 74 (Mich. 1908); *State* v. *Wirt County Court*, 59 S. E. 884 (W. Va. 1907).

CHAPTER XI

THE CLAUSE OF TAKING EFFECT

The usual place for the clause of taking effect is at the end of the act. Like the repealing clause it is not necessary for the validity of a law. A possible exception is found in Kansas where the constitution provides that "the legislature shall prescribe the time when its acts shall be in force and shall provide for the speedy publication of the same, and no law of a general nature shall be in force until the same be published." [1]

The English rule for the taking effect of statutes was determined by the fact that the enrolled bill was the final test of what was the law. Only the date of the beginning of the session appeared upon the roll; consequently, unless otherwise specified, all laws operated from the beginning of the session. The act 33 Geo. III, ch. 13, provided that a certain parliamentary officer should endorse on every act of Parliament "the day, month and year when the same shall have passed and shall have received the royal assent and such endorsement shall be taken to be a part of such act and to be the date of its commencement where no other commencement shall be therein provided." [2] Since that time the rule in England

[1] Const. 1859, 2, 19. It is held that "this provision plainly requires that the legislature shall fix a single definite time when its act as an entirety shall become law," and that an act parts of which go into effect at different times is void. *Miami Co. Comr's* v. *Hiner*, 54 Kan. 334 (1894); *Finnigan* v. *State*, 54 Kan. 420 (1894).

[2] *The King* v. *The Justices of Middlesex*, 2 Barnewell and Adolphus, 818, 821 (1831).

is substantially the same as in this country. In North Carolina, however, the old rule is still followed. All acts take effect from the first day of the session except where a different date is declared.[1]

In America, if no time to go into effect is stated in the law, reliance will be had upon the constitutional rules, if any, or upon general statutory provision or upon custom.[2] The majority of the states regulate the going into force of laws by constitutional provisions. On hardly any other point is there greater variety of practice. Two states put the law into effect immediately on publication.[3] Others provide a delay, presumably to justify the axiom that ignorance of the law excuses no one. In the states which have adopted the referendum the period gives opportunity for the filing of a petition for a popular vote upon the bill. In one state the period of delay is forty days [4] after passage, in another sixty,[5] in another

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[1] *Hamlet* v. *Taylor*, 50 N. C. 36 (1857); *Weeks* v. *Weeks*, 40 N. C. 111 (1847). It is held in the former case that "passage" means passage by the two houses of the legislature, not "ratified" by the executive. Most North Carolina laws are now in terms to operate from "ratification."

[2] Various forms of the clause of taking effect are found; sometimes several are used in a single state. The usual forms are: "This act shall take effect immediately"; "This act shall take effect and be in force from and after its passage" or "from and after the date of its approval" or "its enactment." The first form is followed in New Jersey and New York. California uses the first three forms; Arkansas the last three. In Michigan the favorite wording is: "This act is ordered to take immediate effect," and in North Carolina, "This act shall be in force from and after its ratification,"—if the law is not to follow the rule of referring to the first day of the session.

[3] Ind. 4, 28 (1851); Wis. 7, 21 (1848).

[4] Tenn. 2, 20 (1870).

[5] Miss. 75 (1890).

ninety.[1] Three states make the date sixty days after the close of the session,[2] and eleven ninety days after its close.[3] Still others set a definite date following the passage as June first[4] or July first,[5] or July fourth.[6] In Louisiana, probably due to the influence of French example, the law is in force on the day of publication in the place where the State Journal is published, but elsewhere twenty days thereafter.[7]

Several states give the legislature authority to change the date of going into effect,[8] a privilege often granted in connection with emergency legislation.[9] In order that the people may know the laws, the constitutions of several states enjoin the legislature to provide for their speedy publication,[10] and in two states the law does not begin to operate until its publication,[11] which thus is made a part of its passage so far as its actual date of operation is concerned. In three states the legislature is prohibited from passing legislation contingent upon any event except as provided in the constitution.[12] In many states the clause is often lacking altogether.

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[1] Colorado 5, 19 (1876).

[2] Fla. 3, 18 (1885); Ida. 3, 22 (1889); Utah, 6, 25 (1895).

[3] Ky. 55 (1890); Mich. 4, 20 (1850); Mo. 4, 36 (1875); Neb. 3, 24 (1875), 3 month; Okla. 5, 58 (1907); Ore. 4, 28 (1857); S. D. 3, 22 (1889); Tex. 3, 39 (1876); Va. 53 (1902); Wash. 2, 31 (1889); W. Va. 6, 30 (1872).

[4] Md. 3, 31 (1867, June 1).

[5] Ill. 4, 13 (1870); N. D. 2, 67 (1889).

[6] Iowa 3, 26 (1857).

[7] La. 42 (1898).

[8] Md., Miss., Ore., Tenn.

[9] Col., Fla., Ida., Ind., Ia., Ky., Mich., Mo., Neb., Ore., S. D., Tex., Utah, Va., Wash., West Va.

[10] Col. 18, 8 (1876); Ia. 3, 26 (1857); Kan. 2, 19 (1859); La. 42 (1898); Mich. 4, 36 (1850); Neb. 3, 24 (1875); Nev. 15, 8 (1864).

[11] Kan., Wis. See Ind. 4, 28 (1851) for peculiar wording.

[12] Ind. 1, 25 (1851); Ohio 2, 26 (1851); Ore. 1, 22 (1857).

Indeed where the law is to fall under the usual constitutional or statutory rule, or is to go into effect as custom has established, it adds nothing to the force of the law. Where there is no constitutional rule it is within the power of the legislature to establish by law the time when acts shall take effect. A law of this sort stands only when the acts passed after its passage do not themselves stipulate for a different rule. It is laid down only as a measure of the intent of the legislature in all cases where the legislature has not spoken to the contrary. In states where acts take effect, due to a law, at some time other than their passage, which but for the law would be their date, it is therefore necessary to declare operation from passage if the law is to have that effect.

Where no date for going into effect is given in the constitution, in previous statute or in the act, the rule is that the act goes into effect on its passage. This rule is uniform in both United States and state courts.[1] Passage in this sense does not mean its passage by the two houses of the legislature but the fulfillment of all the constitutional rules for making the act a valid law. What those rules are varies. The United States Constitution gives no rule for the taking effect of the acts of Congress. The usual rule is that in case the act is approved by the executive the act of approval completes the passage.[2] If passed over the veto of the executive the date of final vote is the date of passage.[3] Where a bill becomes a law through non-action by the executive the law is in effect only at the end of the period of time during which the executive might have acted upon it.

[1] *Weatherford* v. *Weatherford*, 8 Porter (Ala.) 171, 174 (1838). *The Brigg Ann*, 1 Gallison 62 (U. S. C. C. 1812).

[2] In Ohio, where an act is to take effect from passage, it goes into force at the date of signing by the president of the Senate. *State* v. *O'Brien*, 47 Ohio St. 464 (1890).

[3] *Commissioners* v. *George*, 47 S. W. 779 (Ky. 1898).

Emergency Clause

In a number of states the constitutions contain provisions relating to "emergency" clauses. These require that all or certain sorts of laws shall not go into effect before a certain time unless in case of an emergency, which is required to be made evident in some cases by passage of the law by an increased majority, in others by a declaration that an emergency exists which shall be stated in the act itself.[1] Such constitutional requirements are held to be mandatory. Some states which require a statement to appear are satisfied with a mere recital that an emergency exists, but others require the nature of the emergency to be stated in the act.

What facts actually constitute an emergency, unless a definition is given in the constitution, is exclusively a legislative question. A Texas case declares, "If the legislature states facts or reasons which in its judgment authorize the suspension of a rule and the immediate passage of a bill, the courts certainly have no power to re-examine that question and to declare that the legislature came to an erroneous conclusion. The legislature . . . is made the sole judge whether facts exist to authorize the immediate passage of a bill."[2] In most states the interpretation given the emergency clause has made it practically of no effect. It is introduced in laws where it is impossible to justify its use, and in some states, (Colorado, for example), it seems to have become

[1] Col. 5, 19 (1876); Fla. 3, 18 (1895), in sixty days unless otherwise provided in act; Idaho 3, 22 (1889); Ill. 4, 13 (1870); Ind. 4, 28 (1851); Ia. 3, 26 (1857); Ky. 55 (1898); Mich. 5, 21 (1907); Neb. 3, 24 (1875); Nev. 15, 8 (1864); N. D. 2, 67 (1889); Ore. 4, 28 (1857); S. D. 3, 22 (1889); Tex. 3, 39 (1876); Utah 6, 25 (1895); Va. 53 (1902); Wash. 2, 31 (1889); W. Va. 6, 30 (1872).

[2] *Day Co.* v. *The State*, 68 Tex. 526, 543 (1887).

almost a customary part of the clause of taking effect. An extreme illustration of the lack of force of the "emergency" provisions of some of our constitutions is a South Dakota law, which reads: "Be it enacted . . . that on and after the passage of this act the State Floral Emblem of South Dakota shall be the Pasque Flower (Anemone patens) with the accompanying motto: 'I Lead'. . . . An emergency is hereby declared to exist and this act shall take effect and be in force on and after its passage and approval."[1]

Time of Taking Effect

A large number of cases raise the point, what is the exact time at which a law goes into effect? The answer involves several questions. If "passage," as that word is variously interpreted, determines the time when a law is to go into effect, either directly or by marking the point from which the period of delay is be reckoned, it still leaves open (1) whether the law is to be held to be in force from the first moment of the day of enactment or (2) whether the exact point of time at which the process of enactment is completed is to be considered, or (3) whether the day of enactment shall be counted out and the law go into effect the first moment of the following day. Again, (4) in counting the period in a law which goes into effect a certain time after passage, do the same rules apply as where a law goes into effect immediately, and (5) should Sundays and holidays be included or excluded, and what rule is to be followed if the period ends on Sunday?

1. The first moment of the day of enactment was formerly the accepted standard for dating the operation of the law and it is still the rule usually adopted in

[1] South Dakota, Session Laws of 1903, ch. 219.

America when no evidence of the exact "moment of passage" is offered.[1]

2. The precise moment of enactment where ascertainable is now sought to be determined in the usual American practice. It would seem as if the maxim that the law does not recognize fractions of a day should apply, but this rule is not without exception.[2]

"It is true that for many purposes the law knows no divisions of a day; but whenever it becomes important to the ends of justice, or in order to decide upon conflicting interests, the law will look into fractions of a day as readily as into the fractions of any other unit of time. The rule is purely one of convenience, which must give way whenever the rights of parties require it. There is no indivisible unity about a day. . . . The law is not made up of such unreasonable and arbitrary rules."[3] The cases where divisions of a day cannot be pled,

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[1] *Tomlinson* v. *Bullock*, L. R. 4; O. B. Div. 230 (1879); *Matter of Howes*, 21 Vt. 619 (1843); *State* v. *Superior Ct.*, 25 Wash. 271 (1901); *Croveno* v. *Atlantic Ave. R. Co. of Brooklyn*, 44 N. E. 968 (N. Y. 1896); *Turnipseed* v. *Jones*, 101 Ala. 593 (Ala. 1893). In Kentucky and Mass. unless the hour when the bill became law appears. *Mallory* v. *Hiles*, 61 Ky. 48 (1862); *Arrowsmith* v. *Hamering*, 39 Ohio St. 573 (1883); *People* v. *Welds*, 59 N. Y. S. 1030 (N. Y. St. 1899). The "law being highly remedial in its nature" goes into effect from first moment of the day "in the absence of evidence as to the precise time when it was approved." While the court will hear evidence and determine the precise moment of time when a statute was enacted where it is necessary to prevent a wrong or assert a meritorious right, yet in the absence of such evidence or means of proof the statute is deemed effective from the first moment of the day of its enactment. *Lloyd* v. *N. C. Ry. Co.*, 66 S. E. 604 (N. C. 1909).

[2] A review of cases in which fractions of a day were recognized in England can be found in *Combe* v. *Pitt*, 3 Burrows Repts., 1423 (1763).

[3] *Grosvenor* v. *Magill*, 37 Ill. 239 (1865).

to show when a law goes into effect, are now rare in America both in United States and state courts.[1] Formerly the Federal courts held that the time when an act was signed by the President was immaterial and that a law would have to be held operative the entire day on which it was enacted.[2]

This rule is still followed in Washington where the court insists that a public law which is to go into effect "immediately" means to include "the legislative day and every moment thereof. The fact that the time was specified when the respective bills were signed by the presiding officer does not change the general rule. As the hour at which the bills passed is immaterial, the effect of the law is the same whether there be any specification of the time of action upon the bill." [3]

3. The courts in some states have decided that an act going into effect on passage or publication should *exclude* the day of passage or publication.[4]

No matter which of the three standards for determining the operation of a law be adopted, it is empirical. Its justification rests on a presumption contrary to fact. The rule that the measure should be the first moment of the day rests on the fiction that the law takes no account of fractions of a day. It has been contended

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[1] *Leidigh Carriage Co.* v. *Stengle*, 95 Fed. R. 637 (1899); *In re Wynne*, Fed. Cas. No. 18117 (U. S. 1868); *Burgess* v. *Salmon*, 97 U. S. 381 (U. S. 1878); *U. S.* v. *Stoddard H. R. Co.*, 91 Fed. 1005 (U. S. C. C. A. 1899); *Croveno* v. *Atlantic Ave. R. Co. of Brooklyn*, 44 N. E. 968 (N. Y. 1896); *People* v. *Welde*, 59 N. Y. S. 1030 (1899); *Kennedy* v. *Palmer*, 72 Mass. 316 (1856); *Davis* v. *Whidden*, 49 P. 766 (Cal. 1897).

[2] *U. S.* v. *Williams*, Fed. Cas. No. 16723 (U. S. 1814), and similar, *In re Welman*, Fed. Cas. No. 17407 (U. S. 1844.)

[3] *In re Boyce*, 66 P. 54 (Wash. 1901).

[4] *Parkinson* v. *Brandenburgh*, 435 Minn. 294 (1886); *O'Connor* v. *Fond du Lac*, 109 Wis. 253 (1901).

that this rule is unjust because the public has no opportunity to know the contents of the law. "An act which is made to operate six hours before the time when it was actually enacted and passed is liable to the same objection, except in degree, as when it has a commencement six days or six years before its enactment."[1] But though a statute can be held to operate back to the beginning of the day on which enacted only by the fiction that the day is indivisible, to hold that it can justly take effect immediately on passage involves almost as great a contradiction of common sense.

Many courts which allow the instant of passage rule, if that point of time can be proved, hold that, in case there is no means of ascertaining the facts, the alternative shall be the very standard which they would like to avoid — the beginning of the day. That standard amounts to escaping from one fiction only by the adoption of a still greater one. Nor is the standard of the end of the day on which a bill is passed sufficient to destroy the arbitrariness of the rule. It is only slightly less a fiction than that of immediate knowledge, to hold that the people can know the law twelve hours or twenty-four hours after its passage.

Any one of these standards is arbitrary and can be justified not because the people who must obey the law can properly be held to know of its enactment at the time these rules declare, but because we have decided that the adoption of any flexible standard would make the law uncertain. Since no flexible standard is adopted, the greatest care should be exercised by the draftsman to insure that, in cases where the rights of individuals may be injured, the law shall become operative only after a delay sufficient to allow the presumption that

[1] Lewis' Sutherland on Statutory Construction, p. 318–19.

the people know its terms to be one which is reasonable in fact and not only by a fiction of law.[1] The maxim that "ignorance of the law excuses no one" is justified only when the law is a public possession.

4. Do the same rules apply in the computation of the period within which, or after which, a law is in effect as in the case of the "passage" of a law to take effect at once? Constitutional provisions in many states, as has been shown, regulate, except in emergency cases, the periods after which acts are to go into effect. Statutory provisions, in case no constitutional rule is adopted, may prescribe a similar rule either generally or in each law. For these reasons the moment at which an act is complete as a law is frequently not the same as that at which it becomes an active agency. It is therefore important to know the rules by which these periods of delay are to be computed.

The rule observed in all but a few states[2] is that the day *from* which, the *terminus a quo*, is to be excluded, and the day of the end of the period, the *terminus ad quem*, is to be included, in the computation. Thus a law which is to go into effect thirty days after March first is held to exclude March first and include March thirty-first in the computation. The law acts from the first moment of March thirty-first.[3] This practice follows the maxim

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[1] See *Mathews* v. *Zane*, 7 Wheat. 164 (1822).

[2] In a few states when the computation is from *an act done* the day of the act is included but when it is *from the day*, the day of the date is excluded. See, for example, *Calvert* v. *Williams*, 34 Md. 672 (1871); *Sheets* v. *Seldon*, 2 Wall. 177 (1865); *Owen* v. *Slatter*, 26 Ala. 547 (1855); *Bemis* v. *Leonard*, 118 Mass. 502 (1875); *Kimn* v. *Osgood*, 19 Mo. 60 (1853); *Commonwealth* v. *Shelton*, 99 Ky. 120 (1896).

[3] See *Logsdon* v. *Logsdon*, 109 Ill. App. 194 (1903), with good illustrative discussion.

that a day is indivisible and one begun is therefore considered to be completed.

Of course this rule will not stand against phraseology which clearly indicates a contrary intent, but, unless there is special reason for holding otherwise, statutes will be held to use "from" and "after" as exclusive in meaning "to," "till" and "until" as inclusive. Where, however, a certain number of "clear days" after passage is stipulated for, the last day would *not* be included in the time during which it would be in force.[1]

5. Questions have often been raised as to whether Sundays should be included in counting a period of days and if so whether a law goes into force on Sunday if the usual rules would make it go into effect then. If there is no written law excluding Sundays it is the accepted rule that they are to be included in counting a period of time even though the law would thus go into effect on Sunday.[2]

Exceptions are sometimes made if the period is less than a week or the last day of the period is Sunday.[3] In states where this special rule is not applied the period practically comes to an end on the preceding day so far as acts to be done within the period are concerned. In Pennsylvania, however, the act in such a case may be done on Monday.[4]

[1] *King* v. *Herefordshire*, 3 Bar. & Ald. 580 (1820).

[2] *Taylor* v. *Palmer*, 31 Cal. 241, 244 (1866); *Chicago* v. *Vulcan Iron Works*, 93 Ill. 222 (1879); *Harrison* v. *Sager*, 27 Mich. 476 (1873); *Haley* v. *Young*, 134 Mass. 364 (1883); *Alderman* v. *Phelps*, 15 Mass. 225 (1818); *Cunningham* v. *Mahan*, 112 Mass. 58 (1873). The practice is reviewed in *Alderman* v. *Phelps*, 15 Mass. 225 (1818).

[3] *National Bank* v. *Williams*, 46 Mo. 17 (1870); *State* v. *Michel*, 52 La. Ann. 936 (1900); *Barnes* v. *Eddy*, 12 R. I. 25 (1878); *Harker* v. *Addis*, 4 Pa. St. 515 (1846).

[4] *Edmundson* v. *Wragg*, 104 Pa. St. 500 (1883).

CHAPTER XII

AMENDMENTS

Two opposing influences may make the legislator who wishes to modify existing law hesitate as to whether his bill shall appear as an amendment or as a new measure accompanied by a repeal of certain provisions of the existing law.[1] The latter method has the advantage of being simple. It removes the old law entire, and writes the new one on a "clean" sheet. There is less necessity for interpretation and less opportunity for confusing the intent of the act. The objection to its use is that it exaggerates the importance of the change made. In the ordinary case a law which emphasizes not the large extent of the change but the justness of the slight modification proposed, will pass more easily. An amendment meets this standard, but, especially when the drafting is not carefully done, it is apt to result in a complicated statute in which implied repeals and concurrent provisions appear. Though a new act is usually drawn with an eye to preserving its unity of purpose and language, an amendment is often passed without comprehending the effect which a change in one paragraph will have on all the other parts of the law. The difficulties are increased when the amending act touches one which has already been amended.

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[1] This is a favorite method of amendment in Maryland.

The proper form for amendments [1] is one of the most difficult and complex problems with which the legislator has to deal. The decisions of the courts do not point to a uniform standard toward which the draftsman must work, but there are a number of rules which, if followed, will insure that the law will be upheld in any court. Less exacting standards may be sufficient in many jurisdictions, but the careful draftsman will make his laws conform not only to what is necessary but to what is desirable.

The first essential for an amending act is that it shall measure up to the constitutional standards. Where such clauses are found they are usually mandatory. The rule commonly adopted is that no law shall be revived,[2] revised or amended by reference to the title only, but the law revised, revived or amended must be reenacted or inserted at length in the proposed act.[3]

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[1] A number of states have constitutional provisions referring to the management of a bill in case it is to be amended during its passage through the house. These are not here discussed.

[2] An example of revival by reference to title is the following: "That chapter 152, Public Laws of 1903, be and the same is hereby re-enacted." Public Local Laws of N. C. 1911, ch. 653.

The necessity of some means to eliminate the possibilities of abuse of this sort needs no proof.

[3] Ala. 45; Ark. 5, 23; Cal. 4, 24; Fla. 3, 16; Ida. 3, 18; Ill. 4, 13; Ind. 4, 21; Kan. 2, 16; Ky. 51; La. 32; Md. 3, 29; Mich. 4, 25; Miss. 61; Mo. 4, 33, 34; Mont. 5, 25; N. D. 64; Neb. 3, 11; Nev. 4, 17; N. J. 4, 7, 4; O. 2, 16; Okla. 5, 57; Ore. 4, 22; Pa. 3, 6; Tex. 3, 36; Utah 6, 22; Va. 52; Wash. 2, 37; W. Va. 6, 30; Wyo. 3, 26.

The requirement was considered only directory in the Georgia constitution of 1868, Art. 3, sec. 6, par. 3. In the constitution of 1877 the clause stating its directory character is omitted. In Maryland a clause requiring amendments to be enacted in articles and sections conforming to the Code is held directory. *Anderson* v. *Baker*, 23 Md. 531 (1865).

Provisions of this sort arose from the revolt against the carelessness with which amendments had come to be passed. The practice developed in many states of using "blind" amendments, by which the context which was to be changed did not appear in the act, but single words or phrases were changed by reference to line and paragraph. This method of proposing changes is almost universally used for the amendment of bills during their passage through the legislature. It is then in its least objectionable form, because the legislator has before him on his bill-file both the proposed law and the proposed amendment. It is comparatively easy to see their relation. But when the amendment refers to a measure passed at a previous legislative session, and the members must look through the compiled statutes or the various session laws in order to understand its intent, it is difficult to know exactly upon what proposition a vote is to be taken. The legislator is almost forced to take the word of the defender of the bill, and this opens up one of the most objectionable opportunities for sharp practice. When laws are rushed through in great numbers at the end of the session, such blind amendments pass without any adequate opportunity for review. The difficulty is greatly increased in the case of successive amendments. Then the law becomes harder to find and the chances of mistakes and confusion are greatly increased. An example will show the impossibility of keeping an efficient check on the smuggling through of objectionable measures when this method of law-making is allowed. An act for extending the period during which an issuance of bonds may be authorized reads: "Section 1. That section nine of chapter three hundred and seventy-one, private laws of one thousand nine hundred and nine, be and the same is hereby amended as follows: Strike out the word

'two' in line four of said section and insert in lieu thereof the word 'six.' " [1]

Similar changes might increase or decrease the number of officers in a department, the amount of salary paid them, the length of an official term, and in other ways disturb the orderly running of the government.

Various expedients have been adopted to make the changes intended clear. In fact, even in states which have no constitutional requirement that the actual law be placed before the legislator, the tendency now is to conform to that standard because of its obvious convenience.[2]

The constitutional regulations of the form of amendments are usually so broad as to allow wide variance in practice among states which have similar or identical regulations. As a result the provisions, even when they are the same, vary in the degree to which they make the amendment clear.

There has been dispute as to what is required by the clause usually incorporated, "the section amended shall be set forth and published at full length." Does this mean that, in order to make the law amended clear to the legislature, it must be inserted in the amending act, or will it suffice if the law *as amended* is printed, or should it be printed as amended, the changes from the old law being indicated by schedule? The Indiana courts once held for the first standard, but the decision has since been overruled, and, except for an occasional

[1] Private Laws of North Carolina, Session 1911, ch. 403.

[2] Examples of the way practice has outrun the constitutions on this point are the laws of New Hampshire and Massachusetts. The most frequent arrangement is to insert at the beginning of the law a statement in the form of a "blind" amendment which ends with "so as to read as follows." The law as it will read concludes the act.

instance explained by superflous caution, the laws amended are not now printed with the laws as amended.

In some states the practice is simply to amend the section "so as to read as follows." The law is then clearly before the legislator, but he may be quite unaware what the changes proposed are unless he makes a detailed comparison with the original act. To obviate this difficulty some states print the changes in a schedule at the top of the bill. Even that does not make the amendment stand out as forcibly as is desirable. The best method counsels the insertion of the old law entire, the amendments being inserted in the act itself in the place which they are to take. What is new matter and what is to be dropped from the former law should be indicated by the printing expedients described elsewhere. In this way what was the law and what is proposed as a substitute may be brought most easily to the attention of the reader.[1]

The force of these constitutional rules is limited by the fact that they are held not to cover the case of implied amendment.[2] The difficulty is similar to that involved in implied repeals. An independent act may be passed which by conflict repeals a portion of the previous act — for amendments are usually only one sort of repeals. It would not be desirable to make the rule that *only*

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[1] A good example of this arrangement is found in the bill forms used in Wisconsin. The session laws show only the new material in italics; the material which is cancelled is omitted. In the bills as they go through the legislature, both the new and the old phraseology are printed.

[2] *Commonwealth* v. *Halstead*, 2 C. P. Rep. 247 (Pa. 1886); *People* v. *Wright*, 70 Ill. 388 (1873); *Timm* v. *Harrison*, 109 Ill. 593 (1884); *Evansville* v. *State*, 118 Ind. 426 (1889); *Norton Co. Com'rs* v. *Shoemaker*, 27 Kan. 77 (1882); *State* v. *Henderson*, 32 La. Ann. 779 (La. 1880). But see the Nebraska practice noted under the discussion of forms of repeals.

express repeals should be given effect, for the amendment in the form of a new act presumably expresses the popular will better than the old law, and to upset the new by the old would retard the growth of the law and contradict the intent of statutory legislation. But these expedients are a distinct advantage, though they are not a solution of the entire problem of amendment, for to the extent that they are used they simplify the statute by encouraging the elimination of the old law, and they cut down the opportunity for corrupt practices through the use of "blind" amendments.

It may be questioned whether the clause as it appears in most constitutions is happily phrased. The form usually followed seems to have originated in the Louisiana constitution of 1844–5. It there read, "No law shall be revived or amended by reference to its title, but in such case the act revived or section amended shall be re-enacted and published at length." Though this clause has uniformly been interpreted to forbid "blind" amendments, the meaning is much better expressed by language such as is used in the Missouri constitution: "No act shall be amended by providing that designated words thereof be stricken out or that designated words be inserted, or that designated words be stricken out and others inserted in lieu thereof; but the words to be stricken out or the words to be inserted, or the words to be stricken out and those to be inserted in lieu thereof, together with the act or section amended, shall be set forth in full as amended." [1]

The constitutional rule and good practice are satisfied if the following requirements are observed:

1. "Blind" amendments are to be avoided. They are unnecessary and confusing, they give an advantage to

[1] Constitution of Missouri 1875, 4, 34.

the political manipulator and in all the states which require amendments to be printed they are unconstitutional.

2. Where a section is revised or amended, it is best to indicate the changes to be made in the customary way and declare the law amended "so as to read as follows." It is not accurate to "amend and re-enact" or "repeal and re-enact" a law when some provision is in fact to be changed. If it is desired to destroy all chance of confusion, because of the survival of the provisions of the former section it is best to drop the form of amendment and to phrase the bill as an original act with a repealing clause annulling the old section. In many cases this will be found the best way to handle what would otherwise be complicated amending acts.

The objection to this method has already been pointed out — that it does not put the old law before the legislator. The defect may, if necessary, be avoided by printing the substance of the former law in a preamble, indicating at the same time the proposed changes.

3. If a section is amended, it should be inserted at length in the act. It is not safe under the wording of most of the constitutional provisions to republish only a paragraph or a clause of a section.[1]

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[1] In Pennsylvania the provision read, "No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended, or conferred shall be re-enacted or published at length." Const. 1873, 3, 6. The same form appears in Alabama and Arkansas. The Pennsylvania Supreme Court has held that even with this phraseology the entire section must be reproduced with any new words added. *Barret's Appeal*, 116 Pa. St. 486, 490 (1887). But see a decision allowing the amendment of a separate numbered subdivision in Nebraska: *State* v. *Babcock*, 23 Neb. 128 (1888).

Citation of Acts

Any method which will identify the act to be changed may be used in citing the act to be amended. Though legally sufficient, it is not always the best practice. In some states customs have grown up which protect the use of unnecessarily clumsy forms. In Maryland, for example, it is the custom to cite in the title and in the enacting clause the complete titles, dates and numbers of the original act and of all amending acts.

Where an act has a number, as in the states which follow the English practice of making every act a chapter or of assigning a number in sequence to every act of a session, there is no excuse for citing the bill by the page of the session laws or the date on which it received approval. In the states where laws are not numbered, that may be the best available method. Good practice counsels that legal authority should be given for the proper numbering of the session laws, for convenience of reference. They may then be best cited by a short reference to the subject with the proper number.

English practice is to insert at the end of each act a statement of a short title, by which it may be cited for amendments, or for discussion in court or elsewhere. Thus chapter 18 of the Statutes of 1910, "An Act to amend the law with respect to Customs in the Isle of Man," declares: "3. This act may be cited as the Isle of Man (Customs) Act, 1910." Chapter 15, "An Act to make provision with respect to organization for the purpose of Rescue and Aid in the case of Accidents in Mines," may be cited as "Mines Accidents (rescue and aid) Act, 1910."[1] A similar practice has been adopted occasionally in Massachusetts and can well be followed in the other states where allowed by the constitution.

[1] The Law Reports, Vol. 48, 10 Edw. VII, 1910.

Citation for Amendment of Acts already Amended

Particular care must be taken in amending acts already amended. Where "blind" amendments are used, since there is only one text, no objection is raised, apparently, to referring to the original text in making any subsequent amendments, and no court seems to have held that in such amendments it is necessary to cite also any amendments which may have been passed in the period following the original act. The best practice is to include reference to all amendments and the decisions of some courts make it doubtful whether a law would be sustained which did not do so.

But greater care must be taken when acts or sections of acts are amended "so as to read as follows." Three methods may be adopted in such cases and all in some states are allowed, but the decisions are so far divided that caution counsels using only a means undoubtedly constitutional under the decisions of all the courts.

1. The original section may be amended without citation of any subsequent amendments.[1]

2. The original section "as amended" by any amendments subsequently passed may be amended — detailing the changes which have been made by all the modifying acts, at least by the customary means of citation of chapters or titles.

3. The last amendment may be amended.

What one of these forms will be held to constitute a valid law depends upon the strictness with which the courts follow out the theory that lies back of their interpretation of amendments. A statute amended does not consist of two separate laws, the old and the new.

[1] Reference is here had to avowed amendments only; of course repeals or amendments by implication are in no case necessary to be cited.

The amendment becomes a unit with the act it amends. The two are construed as one instrument. The old act is no longer in existence, though its unchanged portions may be held to have had a continuing force and not to have been repealed and re-enacted.[1] After the amendment, however, even the provisions of the old act derive their force from the amendment.[2] The only act which is actually in existence is the new act of which the amendment has become an inseparable part.

So far the courts are in agreement. It is still to be determined, however, to what law a second amending act must refer. Though the arguments of the various courts overlap, it is clear that the divergence in opinion arises from the different points of view as to the actual effect of the first amendment on the unchanged provisions of the original law. The conflict in the arguments runs as follows:

1. The amendment and the original act are a unit, all the force of the law is derived from the amendment and when the second amendment refers to the original law it refers to a nullity. It amends a document which, so far as the courts are concerned, can no more be considered than if it had never existed.

2. The amendment and the original act are a unit, and though all the force of the law is derived from the amendment, the sections of the old act, which remained unaltered, have always had force from the time of their original enactment and that character was not destroyed through the passage of the amendment which included their terms "so as to read as follows." The inclusion of

[1] *Giollotel* v. *Mayor*, 87 N. Y. 440 (1882); *Small* v. *Lutz*, 41 Ore. 570 (1902).

[2] *Huffman* v. *Hall*, 102 Cal. 26 (1894); *People* v. *Hiller*, 113 Mich. 209 (1897).

the provisions of the old act in the amendment was done for legislative convenience, not to destroy the character of law in the old provision. The amendment is to be considered not as something which destroys the old law, but as a provision of law which came into force at a later date, just as the original law might have been passed with certain clauses to go into effect at a future time.

If the courts adopt the first argument there can be no doubt that a second amendment referring to the original act, but not to the first amendment, makes no law. It purports to change an act the existence of which has already been destroyed. To guard against the possibility of annulment of the law on this ground, the Political Code of California declares that a statute amended in part is not repealed, but the unchanged portions must be considered as operating from the original enactment. The courts have declared this to mean that it is not necessary in making amendments to refer to all previous amendments.[1] In Kentucky it is held that though a law were amended by the insertion of certain words and thereafter another amendment passed the same legislature without mention of the previous amendment, still, even though the second amendment purported to make the law "read as follows," the two amendments were both to be held operative, and it was not necessary to cite the first amendment.[2] But, except in states where the courts have supported such a practice, it is unsafe to refer to the original bill and not cite the amendments.[3] In no case can such action be considered good practice.

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[1] *Fletcher* v. *Prather*, 102 Cal. 413 (1894).

[2] *Lewis* v. *Town of Brandenburg*, 47 S. W. Rep. 862 (Ky. 1898). Similar, *Lang* v. *Calloway*, 68 Mo. App. 393 (1897).

[3] In Nebraska this form is never to be used. The constitution specifically requires that all amended acts shall be repealed, in language which evidently intends to remove from them all charac-

The second form of citing amended acts, noting the original law and all its changes, it is believed is constitutional in all states.

The third form — citing the last amendment only — is legal in all states. Formerly in Illinois the court held that only the last amendment of an act was the law if the amendment was "enacted so as to read as follows." The court adopted the view that the original act was entirely replaced by the amendment. It was an absolute repeal. The amendment was a law back of which the courts could not look. Their concern was only with the present law and the amendment alone was the present law. Since the court held also that no law could amend a repealed act, the conclusion was that a law purporting to amend an original act, instead of the subsequent amendment, was void.[1] A similar holding controls in Indiana.[2] But this view was repudiated in Illinois in 1904.[3]

The weight of authority favors the validity of an amendment to an original act even if another amendment previously adopted is not mentioned. In practice, however, in citing amended laws for subsequent amendment it is best to cite them "as amended" — the second form described above.

Amending Repealed and Unconstitutional Acts

An interesting question arises when an act purports to amend a law which technically has no existence. Of

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ter of law. If a second amendment refer to the original law it is liable to be held void. Similar, *Peele* v. *Ohio and Indiana Oil Co.*, 63 N. E. 763 (Ind. 1902).

[1] *Louisville and Nashville Railroad Company* v. *City of East St. Louis*, 134 Ill. 656 (1890).

[2] *Peele* v. *Ohio and Ind. Oil Co.*, 63 N. E. 763 (Ind. 1902).

[3] *Village of Melrose Park* v. *Dunnebecke*, 210 Ill. 422 (1904).

these acts there are two sorts, those which are drawn to amend laws which have been repealed, and those which attempt to validate by amendment acts which have been declared unconstitutional.

Theory lies all on one side of the argument. A law which amends an unconstitutional law or one the existence of which was terminated by repeal, should have no more force than one which purported to amend any other document to which the character of law had been denied or had never been given. But the majority of decisions follow a milder rule. Unconstitutional laws are printed in the statute books as are other laws. The same technical work has to be done in amending them as in amending valid laws.[1] There may be the argument of convenience — that it is unnecessary to republish a long law when the change of but one section will cure the defect.

Further, if the law cannot be amended to make it valid, it cannot be repealed to remove it from the statutes — for the same logic would deny that there was any law to amend or to be removed. But it is an obvious advantage to have the power to take the void laws off the statute books, for if they remain they confuse the law and continue to control the action of the people who see the printed statute but do not know that its force has been destroyed.

In the case of repealed laws, too, the acts are already on the statute books and there can be no reason, barring constitutional limitations, why the amendment cannot be held to work a revival of the parts which are not

[1] Technically they have never been laws, actually they may have been on the statute books and obeyed for years. A validating amendment may, so far as the effect on the public is concerned, do no more than an amendment of a valid law.

changed.[1] As far as those who obey the law are concerned, the amendment of a repealed law would have the same effect as a new law, and the law would be as easily ascertained as would be the case if a valid law of the same date were amended.

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[1] A repealed act may be amended,—

Minn. and M. Land and Imp. Co. v. *Billings*, 111 Fed. 972 (U. S. C. C. Ap. 1901), (dictum).
Col. Wire Co. v. *Boyce*, 104 Fed. Rep. 172 (1900).
Harper v. *State*, 109 Ala. 28 (1895).
Fletcher v. *Prather*, 102 Cal. 413 (1894).
Reynolds v. *Board of Education*, 72 Pac. 274 (1903).
State v. *Brewster*, 39 Ohio 653 (1883).

A repealed act may be amended "so as to read as follows,"—

People v. *Pritchard*, 21 Mich. 235 (1870).
White v. *Inebriate's Home*, 141 N. Y. 123 (1894).
Van Clief v. *Van Vechten*, 55 Hun. 467 (N. Y. 1890).
Golonbieski v. *State*, 101 Wis. 333 (1898).

Act amending a repealed act is void,—

Louisville & N. R. Co. v. *City of East St. Louis*, 134 Ill. 656 (1890).
Lampkin v. *Pike*, 115 Ga. 827 (1902).
In re Terrett, 34 Mont. 325 (1906).
Wall v. *Garrisen*, 11 Col. 515 (1888).
Peele v. *Ohio, etc., Oil Co.*, 158 Ind. 375 (1902).
Blakemore v. *Dolan*, 50 Ind. 194 (1875).

An unconstitutional act may be amended,—

State v. *Corbett*, 61 Ark. 226 (Ark. 1895).
Minnesota and M. Land and Imp. Co. v. *Billings*, 111 Fed. 972 (U. S. C. C. Ap. 1901).
People v. *De Blaay*, 137 Mich. 402 (1904).
Keystone, S. T. & T. Co. v. *Borough of Ridley Park*, 28 Pa. Sup. Ct. 635 (1905).

An unconstitutional act cannot be amended,—

Cowley v. *Town of Rushville*, 60 Ind. 327 (1878).
City of Plattsmouth v. *Murphy*, 74 Neb. 749 (1905).
Dean v. *Spartanburg Co.*, 59 S. C. 110 (1900).

An unconstitutional act may be repealed,—

Arill v. *Field*, 119 Mo. 593 (1894).

The weight of opinion is in favor of the validity of amendments of repealed and unconstitutional acts. The present holdings of the state courts are, however, so divided that unless an authoritative state decision covers the point the safe standard is *not* to amend a repealed act and not to rely on amendment to make an unconstitutional law valid.

CHAPTER XIII

RESOLUTIONS

Barring a constitutional limitation, any purpose accomplished by a bill may be accomplished by a resolution. Differences between the two are chiefly customary; a measure which begins with words of enactment such as "Be it enacted by the Legislature of ——" is a bill, a measure which begins "Be it resolved" is a resolution, though the content of the two may be identical.[1] After passage into law the bill becomes an "act," the resolution formally remains a "resolution." In essence, then, bills and resolutions differ in form but not necessarily in substance.

Often legislative rules provide a more summary procedure for the passage of resolutions and where this is the case resort will be had to them where the added technicalities of bill procedure proper make it opportune. The use of resolutions, however, is subjected by custom to important limitations and our constitutions often intentionally, sometimes apparently without design, place restrictions on their use.

Custom has made the rule that the ordinary means of lawmaking shall be by bill and has confined resolutions to a subordinate sphere in which they facilitate the making of laws or declare the wish of the legislature without fixing a definite, permanent and general rule of

[1] In some states, however, a practice is now developing by which resolutions start with an enacting clause to avoid possible conflict with the constitutional rules as to "style." See, for example, the South Carolina practice.

action.[1] In carrying out this purpose they may or may not have the force of laws proper. There have arisen several distinguishable ends for which resolutions may be used in which they do not have the force of laws.

Resolutions not Having the Force of Law

The organization of the legislature, the relations of the departments of government to each other in functions where co-operation is necessary, the formal relations between the branches of the legislature itself and the control by the legislature or a branch of the legislature over its own functions often involve the use of resolutions. Examples of this sort of resolution are resolutions for the appointment of committees to inform the governor of the organization of the legislature, the requests by one branch of the legislature to another that a bill passed by the first branch but in the control of the other should be returned to the body which it first passed, resolutions as to joint rules, resolutions requesting the return of a bill by the governor to the legislature, and resolutions for the establishment of joint committees.

Resolutions are used to state the opinion of the legislature on non-political matters, to express its good-will, regret or indorsement on non-contentious subjects. Such are those expressing condolences or sympathy to those in misfortune, voting thanks for courtesies extended or extending congratulations. Frequently they are used to declare political policy or opinion. Such are declarations of the policy of the state, or the attitude of the legislature toward certain contemplated legislation or administrative action. The requests sent to congressmen,

[1] "A joint resolution is a form of legislation used chiefly for administrative purposes of a local or temporary character." *Olds* v. *Commissioner of State Land Office*, 86 N. W. 956 (Mich. 1901).

senators, or to Congress as a whole that certain action be taken or not taken, or resolutions addressed to state or national executives with a like purpose, are of this class.

Resolutions of Lawmaking Character

But where the constitutions allow it resolutions are not necessarily confined to so subordinate a position and may be true lawmaking measures. Custom here also has developed limitations. Though the *power* to use resolutions for lawmaking be unrestricted, legislatures usually confine their use to less important subjects. It should be borne in mind that in some states there is no constitutional *authority* for the use of resolutions for lawmaking and their use rests on the general authority of legislative bodies coupled with the silence of the constitutions. In some states custom has so long sanctioned their use for certain lawmaking purposes that the courts are not likely to disturb the practice. In still other states constitutional limitations forbid the passage of law by resolution. Except where these limitations apply, practice is the only means by which their function is differentiated from that of laws.

Resolutions of lawmaking force[1] usually deal with minor matters, often of a transitory character. The most numerous class are those dealing with small appropriations. Less numerous are those prescribing duties of a temporary character for state officials or committees, providing and regulating joint action with other states for certain ceremonies, giving authority to administrative officials over emergency appropriations, granting

[1] In Massachusetts the term "resolution" is confined to non-lawmaking measures. Lawmaking resolutions are called resolves. In Rhode Island the session laws group all resolutions under the caption, "Resolves," but individual measures are all styled resolutions.

expenses to state officers in connection with certain classes of suits, regulating the use of state property, fixing the salary of temporary legislative employees and a host of similar purposes. The character of these resolutions is illustrated by the following examples gleaned from the session laws of 1910 and 1911. Statutes are found which require the state prison warden to furnish a number of convicts to work for the state insane asylum, appropriating money for the celebration of the centennial of the Battle of Lake Erie, appropriating money to install lockers at the state armory, directing the action of the state sealer, authorizing the printing of a memorial address, directing that the clerks of standing committees be given copies of the session laws and making appropriation therefor, granting a gratuity to doorkeepers, adding certain roads to the "State Highway System," and regulating the distribution of the general laws.[1]

Lawmaking by Resolution with Constitutional Authority

The American constitutions vary in their attitude toward resolutions from the position of the Federal instrument where the use of resolutions for lawmaking is incidentally recognized to that of some of the state constitutions which forbid their use outright.[2]

In the Federal Constitution there are several clauses which seem to show the acceptance of resolutions as a means of lawmaking. There is no requirement of an

[1] A detailed classification of the minor lawmaking purposes for which resolutions are used is given in Willard, Legislative Handbook, Houghton, Mifflin & Co., New York, 1890.

[2] Silence of the constitution has been held to prevent legislation by resolution in *Boyers v. Crane*, 1 W. Va. 176, 1865, and *State v. Kinney*, 56 O. St. 721 (1897); see also, *Barry v. Viall*, 12 R. I. 18 (1880).

enacting clause which would indicate an intention to confine lawmaking to bills, though this presumption is contradicted in the constitutions of some of our states and there is no requirement that laws shall be passed by bill. Both these restrictions are frequently found in state constitutions, as will be shown later. Further, the language of the constitution indicates that it was intended to allow resolutions to have a lawmaking character, or at least that it was anticipated that they would be so used, and therefore the requirement was inserted that they should, when they necessitated concurrence of both houses, be submitted to the president "according to the rules and limitations prescribed in the case of a bill." [1]

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[1] "Every bill which shall have passed the House of Representatives and the Senate shall, before it become a law, be presented to the President of the United States. If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two-thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

"Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill." U. S. Const. Art. I, sec. 7.

The language is not clear. It is not directly stated that resolutions and bills stand on an equal footing but the practice of Congress has established them in that position.[1] The example of the Federal Congress too has doubtless been a powerful influence in the spread of that practice to the states though they are often not in the same constitutional position.

A few states in their constitutions make more direct recognition of resolutions as a lawmaking means. Some states have been directly influenced by the Federal Constitution to adopt, in their own, clauses similar to those found in the former. But except in Georgia and Kentucky the force of the provisions is weakened

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"Mr. Madison, observing that if the negative of the President was confined to bills, it would be evaded by acts under the form and name of resolutions, votes, &c., proposed that 'or resolve,' should be added after 'bill' in the beginning of section 13, with an exception as to votes of adjournment, &c. After a short and rather confused conversation on the subject, the question was put and rejected." (Madison Papers, page 1337, vol. 3.)

"Mr. Randolph, having thrown into a new form the motion putting votes, resolutions, &c., on a footing with bills, renewed it as follows — 'Every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment, and in the cases hereinafter mentioned) shall be presented to the President for his revision; and before the same shall have force, shall be approved by him, or, being disapproved by him, shall be repassed by the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.' Mr. Sherman thought it unnecessary, except as to votes taking money out of the treasury, which might be provided for in another place. On the question as moved by Mr. Randolph, it was agreed to." (Madison Papers, page 1338, vol. 3).

The provision requiring lawmaking resolutions to follow the course of bills has been copied in many states.

[1] "Votes" and "orders" mentioned in the Federal Constitution have not developed as separate means of lawmaking.

by the introduction of enacting clauses or requirements that laws be enacted by bill, so that it may be questioned whether it was the intent to consider the resolving clause equivalent to the enacting clause and to consider a resolution to be "a bill."

With these limitations there are now twenty states which recognize resolutions as a lawmaking means by requiring them to follow the same course as bills so far as *executive* action is concerned.[1]

There are other occasional references to resolutions which indicate that they are considered as equal to bills when of lawmaking character so far as they involve *legislative* action. Such is the Vermont provision, "And no bill, resolution or other thing which shall have been passed by the one (branch of the general assembly) shall have the effect of or be declared to be a *law*, without the concurrence of the other."[2]

The practice of most states and recent constitution making seem to indicate, however, that the use of resolutions for lawmaking purposes is falling out of favor,[3] at least when the measures deal with important sub-

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[1] Ala. 125, 16 (1901); Ark. 6, 16 (1874); Col. 5, 39 (1876); Ga. 5, 1, 17 (1877); Kan. 2, 14 (1859, amendment 1894); Ky. 89 (1891); La. 78 (1898); Me. 4, 3, 2 (1820); Mass. part 2, c. 1, sec. 1, art. 2, and Amendments, art. 1 (1780 and 1821); Minn. 4, 12 (1857); Mo. 5, 14, and 5, 12 (see also, proviso in 4, 40 (1875); Mont. 5, 40 (1889); Neb. 5, 15 (1875); N. H. 2, 44 (1902); Okla. 6, 11 (1907); Pa. 3, 26 (1874); S. C. 4, 23 (1895); Tenn. 3, 18 (1870); Tex. 4, 15 (1876); Wyo. 3, 41 (1889). Of the same general nature is Ida. (1889) 3, 17.

[2] Const. Amend. 1836, art. 3. Similar in recognizing equality of bills and resolutions are: Ga. 3, 7, 12 and 13 (1877); Ky. 46 (1890): "An act or resolution for the appropriation of money, etc."; La. 38, (1898); Neb. 3, 11 (1875, amended 1886); N. H. 2, 44 (1902); N. C. 2, 23 (1876); S. C. 3, 17 and 18 (1895).

[3] This is in contrast to the Federal practice noticed elsewhere.

ject-matters and especially with appropriations. In some states the rules against the use of resolutions rest on judicial construction of provisions of the constitutions. In other states there are specific provisions *against* their use in the constitutions themselves.

Does Requirement of an Enacting Clause prevent Lawmaking Resolutions?

In states which command the use of a prescribed "style" the question has often been raised whether the requirement of an enacting clause prevents the use of a corresponding "resolving clause." In the Federal Government a form for resolutions has been prescribed by statute and some states have adopted a similar custom in spite of the requirement of an enacting clause. The courts are widely at variance as to whether the practice can be permitted. The decisions are so contradictory that it is unsafe to use the resolving clause for lawmaking in a state where the question has not been passed upon.[1]

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[1] In favor of the practice,—

A constitutional requirement of style "be it enacted" does not apply to "resolution, order or vote" as contradistinguished from a bill. *State* v. *Delesdenier*, 7 Tex. 76 (1851).

"A joint resolution enacted by the words "be it resolved," etc., is a sufficient compliance with the mandatory provision of the constitution, art. 3, 16, requiring all laws to be enacted by the words, "be it enacted," etc. *Smith* v. *Jennings*, 45 S. E. 821 (S. C. 1903). Approving the following holding in Mississippi: "The word 'resolved' is as potent to declare the legislative will as the word 'enacted.'" *Swann* v. *Buck*, 40 Miss. 268 (1866). But in Mississippi the *enacting clause* was held only directory. Similar, *Weeks* v. *City of Galveston*, 51 S. W. 544 (Tex. Civ. App. 1899).

Against the practice,—

A resolving clause can not take the place of an enacting clause. *May* v. *Rice*, 91 Ind. 546 (1883); *Boyers* v. *Crane*, 1 W. Va. 176 (1865); *In re Advisory Opinion*, 31 So. 348 (Fla. 1901).

If Laws Must be Passed by Bill, are Lawmaking Resolutions Excluded?

A question of much the same nature arises in states where all laws are to be made "by bill." [1] In the strict sense of the word this provision seems to exclude any other means. It was declared to do so in the Michigan constitutional convention of 1907, by which a provision of this sort was adopted to do away with the lawmaking joint resolutions authorized by the constitution of 1850.[2]

The use of joint resolutions in South Carolina is shown in the following table given in *Smith* v. *Jennings*, 45 S. E. 821, 825 (S. C. 1903). Some joint resolutions use the phrase "be it enacted," others, "be it resolved." Though the constitution has a mandatory enacting clause the following practice appears:

Year.	Total Joint Resolutions.	Enacting Clause.	Resolving Clause.
1896	29	20	9
1897	All joint resolutions used, — "Be it enacted."		
1898	16	15	1
1899	All joint resolutions used, — "Be it enacted."		
1900	19	18	1
1902	33	13	20
1903	20	4	16

[1] This provision is found in varying forms in Ala. 61 (1901); Ark. 5, 21 (1874); Cal. 4, 15 (1879); Col. 5, 17 (1876); Ida. 3, 15 (1889); Ind. 4, 1 (1851); Kan. 2, 20 (1859); Md. 3, 29 (1867); Miss. 60 (1890); Mo. 4, 25 (1875); Mont. 5, 19 (1889); N. D. 58 (1889); Neb. 3, 10 (1875); Nev. 4, 23 (1864); N. Y. 3, 14 (1894); Pa. 3, 1 (1874); Tex. 3, 30 (1876); Va. 50 (1902); Wash. 2, 18 (1889); Wis. 4, 17 (1848); Wyo. 3, 20 (1889).

[2] "All legislation must be by bill under the revision, thus insuring greater publicity. Legislative action by joint resolution was designed chiefly for administrative purposes of a local and temporary character. The uses of the joint resolution have been unduly extended and it was deemed wise to forestall the abuses practiced under it by . . . . sec. 13, Art. IV of the present constitution." Journal of the Constitutional Convention, 1907, Feb. 22, p. 1550.

Except where there are decisions holding in effect that "bills" include "resolutions" it is unsafe in the presence of constitutional provisions of this sort to use the latter for lawmaking purposes.[1]

In view of the general trend against the use of resolutions as shown in the recent constitutions the cautious draftsman will use them for lawmaking purposes only when they are not only clearly not forbidden by the constitution but demanded by local custom and sustained by the courts. The advantages to be gotten from their use are slight, in fact where as in some states the constitution requires that they shall go through the same life history as bills, there are no advantages which compensate the danger which often accompanies their use.

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[1] States in which lawmaking must be by bill are the following:

No law to be enacted except by bill,—
Ind. 4, 1 (1851); Kan. 2, 20 (1859); Neb. 3, 10 (1875); Nev. 4, 23 (1864); N. Y. 3, 14 (1846); Ore. 4, 1 (1857); Wash. 2, 18 (1889); Wis. 4, 17 (1848).

No law shall be passed except by bill,—
Ala. 4, 19 (1875); Ark. 5, 21 (1874); Cal. 4, 15 (1879); Col. 5, 17 (1876); Ida. 3, 15 (1889); Mo. 4, 25 (1875); Mont. 5, 19 (1889); Pa. 3, 1 (1874); Tex. 3, 30 (1876); Wyo. 3, 20 (1889).

No law shall be passed except by a bill adopted by both houses,—
N. D. 58 (1889).

All laws shall be passed by original bill,—
Md. 3, 29 (1867).

The following decisions have been rendered on the meaning of the requirement of enactment by bill:

Held to exclude resolution as a means of lawmaking,—
Lithographing Co. v. *Henderson*, 18 Col. 259 (1893); *Mullan* v. *State*, 114 Cal. 578 (1896), and *May* v. *Rice*, 91 Ind. 546 (1883).

Held not to do so,—
Weekes v. *City of Galveston*, 51 S. W. 544 (Tex. Civ. App. 1899).

The same criticism applies to the use of resolutions in states the constitutions of which prescribe that certain things shall be done by "*law*." It is doubtful whether these provisions were meant to exclude resolutions; yet when in the same constitutions provisions are found that "no law shall be passed except by bill" the presumption is that the bill and law are meant to be correlative throughout and that therefore the use of resolutions where the constitution prescribes that a thing is to be done by law is unsafe in the absence of decisions to the contrary.[1]

Long-established custom has made resolutions the accepted method of submitting to the electorate questions of constitutional changes. So general has the practice become that there is little danger that the courts will upset it even though in the greater number of states the language used declares that the action should be taken "by law."

Our conclusion is, that in cases where the constitution requires that legislation be "by bill" or "by law" the only absolutely safe rule for the legislator to follow is to adhere closely to the express requirements of the constitution and not rely on the silence of that instrument or the lack of express negative

[1] This comment applies especially to measures making appropriations, which in every state except Conn., Mass., N. H., R. I., and Vt. are required to be made "by law." It applies too, to the states where the duties of constitutional officers are to be prescribed "by law." A lesser number of states require the duties of legislative employees and the provisions for printing and binding statutes, journals, etc., to be made "by law." Decisions have been given holding that provisions of these sorts exclude the use of resolutions.

Resolutions held excluded,—

May v. *Rice*, 91 Ind. 546 (1883); *Mullan* v. *State*, 114 Cal. 578 (1896).

provisions to carry through his measure drawn in unusual form.

Express Prohibitions of the Use of Resolutions

Express limitations on the right to use resolutions are infrequent except so far as the requirement of legislation "by bill" or "by law" is held to be exclusive. There are a few specific prohibitions, chiefly involving money. The Illinois and Nebraska constitutions provide that, "No money shall be diverted from any appropriation made for any purpose or taken from any fund whatever either by joint or separate resolutions." In Missouri, "No resolution shall have the effect to repeal, extend, alter or amend any law." But these provisions are exceptional.[1]

Any review of the constitutional provisions with the object of obtaining an insight into how far resolutions may be used for lawmaking must convince the reader that on this point there is a lamentable lack of clear statement of the intent of the makers of the constitutions. Whether in any state "law," "bill" and "act" and "act of legislation" are to be held to include or exclude "resolutions" can, as a rule, not be deduced from the constitution itself, at least not without giving to the words meanings which they may not have had when originally used. They are often used in different senses in different parts of the constitutions, or long practice has justified one meaning in one part of the constitution and a different one in another. For example, the provisions regarding constitutional conventions are usually required to be made by law, but are regularly made by resolution. Bills and laws are sometimes joined as to requirement of executive approval or as to legislative procedure; constitutions speak of resolutions "having

[1] See Ill. 4, 17 (1870); Mo. 5, 14 (1875); Neb. 3, 22 (1875).

the force of law,"[1] and declare that with executive approval a resolution shall "become a law."[2]

The worst confusion is found in the constitutions of Kansas and Nebraska. Both contain provisions that "laws" shall commence with enacting clauses and that no law shall be enacted except by bill, and yet the Kansas constitution recognizes that there are resolutions which may necessitate submission to the executive — which would occur only if they were of lawmaking character — and it is definitely stated that when passed over the Governor's veto such a resolution "shall become a law." Again, in Nebraska, resolutions must be submitted to the Governor and when one is approved by him it "shall become a law."

In the face of constitutional provisions such as these it is no wonder that the courts have not arrived at an agreement as to what rules are to be followed. The condition results from two causes: first, it is only with the greatest care that words are confined to the same sense throughout any long legal document; secondly, our constitutions are made from clauses largely borrowed from earlier constitutions. They tend to become patchwork, if not crazy-quilts, as some would have us believe, and there is not always sufficient pressure brought to bear on the convention to force it to mould all the clauses of the new instrument into a consistent whole.

The consequence for the draftsman is that under present American conditions there is only one safe rule to follow in determining the sort of measure to use in making a law. That rule is, legislate by bill. The use

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[1] Me. 4, 3, 2 (1819).

[2] Neb. 5, 15 (1875), and Kan. 2, 14 (1859, amendment of 1894). Similar, Okla. 6, 11 (1906); S. C. 4, 23 (1895).

of resolutions is safe if the local constitution authorizes them or they are supported by accepted decisions; it may be safe if the constitution is silent and custom has made their use familiar. The use of a bill is always safe.

Many will feel that the falling into disuse of resolutions for minor purposes is unfortunate and that if everything is done by bill the statutes are unnecessarily encumbered by temporary measures which should be differentiated in a way to allow their separate publication and their easy discard when they have served their purpose. This is true, as the present practice of states which have discarded or prohibited the lawmaking resolution shows.[1] But so long as our constitutions do not speak clearly as to the position of resolutions, the legislator who is anxious to devote his chief attention to the substance of legislation rather than its form will feel justified in any doubtful case in resorting to the means which is of unquestioned validity.

[1] See, for example, Statutes and Amendments to the Codes, California, 1911, and Laws of Maryland, 1910.

CHAPTER XIV

CLAUSES CREATING EXCEPTIONS IN THE OPERATION OF STATUTES

A convenient way to escape exact definition of the circumstances in which a law is to operate is to draft the measure as one of general application and to insert at the end the cases exempted from the rule. The temptation to use this plan is especially strong when it is desired to amend an act already passed. The simplest means is to introduce an exception covering the modifications. The practice is indefensible. Draftsmen are agreed that no single element contributes more to confusing our laws than the use of exceptions where the subject-matter should be covered by a direct statement.

If certain persons are to be excluded from the operation of the law, this should appear in the language of the legal subject. Sometimes provisos limit the time, place, manner, or circumstance of the operation of the act. The better form would be to state the modification directly in the legal action. If particular conditions are to be dispensed with, that should be done by changing the statement of the condition. The most frequent abuse is using the proviso when the material should have been put in the "case."

Dwarris in his work on Statutes, declares:

"The *casus legis*, which can be described in a proviso or in a phrase interpolated into other matter by way of limitation, can be more easily expressed alone and at the beginning of the enactment. It is equally beyond

a doubt that its proper place is at the beginning, and that it is misleading the reader to commence an enactment as if it were universal and to wind it up by a parenthetical qualification or proviso which limits it to certain occasions only." [1]

Clauses Creating Exceptions, Definitions

The terms exceptions, saving clauses, and provisos, are so frequently interchanged in discussion, that they have largely lost the distinctness of meaning they once had. "Proviso," in texts and decisions, is often used to include the other terms. The form in which the clauses are expressed is often that properly belonging to the proviso, with the result that the difference in subject-matter is overlooked. The rules of interpretation applying to the three classes are not uniform. This is the chief reason why their use is not favored. Since the form in which the clauses are phrased is confused, the draftsman often loses sight of the difference in the rules governing them, and in this way the intent of the statute is defeated.

A proviso properly so called is, "something engrafted on a preceding enactment for the purpose of taking special cases out of the general enactment and providing specially for them. In its abuse it contains all unconnected matters and disposes of whatever is incapable of combination with the rest of any clause." "The distinction in effect and operation of a saving clause and of a proviso in a statute will be found in the books laid down as positive and without qualification, but the reason of the distinction is certainly not very apparent." [2]

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[1] Potter's Dwarris on Statutes, 2d ed., p. 512.

[2] *Ibid*, p. 514–15.

An exception, like a proviso, restrains the enacting clause to particular cases, but unlike the proviso it does not provide special rules for the cases it includes. It merely keeps the proposed law from having the force it otherwise would have. "The effect of an exception which is a part of the enacting clause and is of general application is simply to restrict it as to the matter excepted." [1] There seems no difference in kind between this expedient and the saving clause. It is used as a rule for exceptions to certain clauses of the enactment, the saving clause being a more comprehensive exception which keeps the law from any operation on a particular subject.

A saving clause, like the proviso, is an exemption of a special thing out of the general things mentioned in the statute. It does not provide a special regulation for the cases saved from the operation of the law, but, as its name implies, it is inserted to preserve from loss or destruction certain rights, remedies, or privileges.[2] It is generally employed to restrict repealing acts, to continue repealed acts in force as to existing powers, inchoate rights, penalties incurred, and pending proceedings arising on the repealed statute.[3] It must refer to a thing *in esse*, its nature is to preserve a former right and not to give or create a new one. Thus a saving clause in a repeal of a criminal act does not create any power to punish, but only preserves that which before existed as to cases which have already arisen.[4]

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[1] *Vavasour* v. *Ormrod*, 6 B. &. C. 430 (1827); see also, *Rowell* v. *Janvrin*, 151 N. Y. 60 (1896).

[2] *Arnold* v. *Mayor of Gravesend*, (1856) 2 K. & J. 574 at p. 591.

[3] See Lewis' Sutherland, Statutory Construction II, 679; *The Irrisistable*, 7 Wheat. 551.

[4] Saving clauses are often inserted where they are superfluous. "The insertion of a saving clause is never a safe ground for deter-

A saving provision covering certain classes of cases is often provided by a general statute. Such laws are those which declare that no law repealing a former criminal statute shall affect a repeal as to crimes already committed, or that where a repeal is passed all inchoate rights and all remedies to which a party was entitled under the former law shall be preserved unless the repeal stipulates to the contrary. Of course these acts do not bind future legislatures, but as all legislatures are presumed to act with a knowledge of the existing laws, they will control unless expressly repudiated.

Construction and Pleading of Exceptional Clauses

Provisos and exceptions are to be construed with reference to the immediately preceding parts of the clauses to which they are attached. Yet where the obvious meaning shows a contrary intent on the part of the legislature, the mere position of the clause will not restrict its operation.

The difference in their subject-matter between provisos and exceptions has been pointed out. An arbitrary rule determines the manner in which they are to be plead. It is thus defined by Dwarris:

"There is a known distinction in the law between an exception in the purview of the act and a proviso. If there be an exception in the enacting clause of a statute it must be negatived in pleading, a separate proviso need

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mining the construction of an act of Parliament whether local or general. We all know the anxiety which there is on the part of every one who imagines that his rights may be infringed by the passing of an act, whether general or local, to procure the insertion of a saving clause to protect them, even where the ordinary rules of construction supersede the necessity of any such protection." *Fitzgerald* v. *Champneys* (1861), 2 J. & H. at p. 59. Quoted by Beale, E., p. 268.

not, and that although it is found in the same section of the act, if it be not referred to, and engrafted on, the enacting clause." [1]

A proviso stands as the last expression of the will of the legislator, and it is therefore controlling, even if its effect is to overthrow the act. For example, if a statute forbids the doing of an act except upon a condition precedent, and the condition cannot possibly be performed, the condition is valid and the prohibition as absolute as if it had been provided that no license should be issued.[2]

There seems no good reason why the same rule should not apply in the case of a saving clause, but "by a singular caprice of the law a saving clause totally repugnant to the purview is rejected while a proviso directly repugnant . . . repeals the purview." [3]

It is not necessary for the purpose of this volume to discuss in detail the holdings, often contradictory, which have been arrived at by the various courts as to the effect of the clauses in their jurisdictions. For the courts such rules are important, and, when the clauses are resorted to, the draftsman must be careful to phrase the act so that it will observe the rules laid down in the state for which it is intended. Enough has been said to indicate to those framing laws that these clauses are to be avoided whenever possible. A careful draftsman will seldom, if ever, find that the same purpose cannot be better accomplished in a more direct way.

The confusion attending the use of provisos thoroughly justifies the characterization of them by a classic writer

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[1] 1 B. & A. 94, quoted in Potter's Dwarris (1871), p. 119.

[2] *State* v. *Douglass*, 5 Sneed (Tenn.) 608 (1858).

[3] See Lewis' Sutherland, Statutory Construction, Vol. II, p. 669. The rule was laid down in *Atty.-Gen.* v. *The Chelsea Water Works Co.*, Fitzgibbon, 195, cited in Dwarris on Statutes (1871) 118.

on legislative expression as "the bane of all correct composition." [1] In summing up the case against them, he declares:

"It is most desirable that the use of provisos should be kept within some reasonable bounds. It is indeed a question whether there is ever a real necessity for a proviso. At present the abuse of the formula is universal. . . . Nothing has inflicted more trouble on the judges than the attempt to give a construction to provisos. . . . There are . . . in their decisions various distinctions propounded between mere exemptions or exceptions and salvos and proper provisos. But it is admitted by all writers to be impossible to make any general application of the doctrines laid down by the courts to the multitude of cases in which the formula of a proviso has been adopted. Where the form of a proviso in fact serves only to make a mere exception how can a doctrine which distinguishes a proviso from an exception apply? And what doctrines of interpretation can possibly be applied to the innumerable provisos used in our statutes only as formulæ for heaping together matter wholly unconnected or only so remotely connected as to be incapable of being combined with the rest by the use of any form of speech of a settled meaning.

"The present use of the proviso by the best draftsmen is very anomalous (and) whenever matter is seen by the (ordinary draftsman) to be incapable of being directly expressed in connection with the rest of any clause, he thrusts it in with a proviso. Whenever he perceives a disparity, an anomaly, an inconsistency, or a contradiction, he introduces it with a 'provided always.' . . . Considering the obscurity of the doctrine on the subject

[1] Coode on Legislative Expression, in Law Library, Vol. 58, p. 17.

of the construction of provisos, it is even questionable whether a correct use of the proviso would secure a correct interpretation. It would, therefore, probably be better never to admit the formula at all. At all events, if it were limited to proper occasions it would not ordinarily make its appearance once in all the acts of a session." [1]

[1] *Ibid.*, p. 36–43 (excerpts).

III

Legislative Expedients

CHAPTER XV

EXPEDIENTS FOR IMPROVING THE FORM OF BILLS

As problems of administration become complex, legislatures find it impossible to prescribe all the details of law. The power to make the finer adjustments must be delegated to some other authority. The pressure of a large number of bills for consideration has of itself increased the difficulty of securing passage for long and detailed measures. The legislative fortune of a measure is to a large degree bright in inverse ratio to its length. The advocate of a new law will prefer to avoid a long bill both from the desire to make the law flexible and because every added clause increases the opportunity for debate and obstruction. One of the most striking characteristics of recent legislation is the development toward the delegation of powers. Commissions are given control over fields in which the legislature would have formerly resented the exercise of any power except by itself, and the authority to prescribe rules to supplement the law has been increasingly entrusted to administrative officials.

Situations more complicated than legislatures have ever before dealt with have brought also the use of various expedients to make the law *as printed* simpler than would be the case if each detail had to be repeated each time it was touched by the force of the act. Some of the more important means by which these ends are reached are here discussed.

The Schedule

This expedient has now developed into two forms, one fulfilling the former meaning of the word, an enumeration of details not touching the policy of the law, and the second an expedient to avoid definitions and the necessity of repeating series of words defining the scope of a law.

A popular use of the schedule of the first sort is for temporary parts of acts to supply the rules which are to govern during the period before a law can come into full effect, as for example in laws concerning changes in the terms of public officers. A schedule may be introduced to insure that the new law shall not disturb the terms of the officers already elected or it may regulate the conditions under which they shall surrender control to their successors.

Similar are the schedules often attached to constitutional amendments setting out the conditions under which they shall be submitted to popular vote for ratification. Expedients of this sort are favored because the temporary provisions, being grouped together, are readily eliminated after they have served their purpose and thus make it easy to consolidate the substantive part of the law.

Care should be taken that in schedules of this sort nothing which is intended to be a permanent rule should be inserted. To be sure, the generally accepted rule, still followed without exception in England, is that "a schedule is as much a part of an act as the sections by which it is preceded."[1] Consequently the permanent provisions, where this rule is adhered to, would not fall. But the disadvantage of mixing temporary and permanent

[1] *Attorney-General* v. *Lamplugh* (1878), 3 Ex. D. 229. Quoted by Ilbert, Legislative Methods and Forms, p. 268.

rules is evident. Further, it has been held in Ohio that a clause apparently permanent will fall with the temporary provisions if it is included in the schedule attached to a new constitution.[1] The line between what should and what should not go into a schedule under this rule is not always easy to draw, but the principle is clear.

The second sort of schedule is a substantive part of the act. By the adoption of this expedient a single word may be selected which throughout the act will stand for a series of words enumerated only once — in the schedule. To some extent the schedule is subject to the objections elsewhere given to the use of definitions, for when a single word is held to stand in the act for a series it amounts to almost the same thing as defining the single word to mean the terms in the series. A better practice is to refer to the series not by what may be called the index word of the schedule but by citing the schedule itself. Thus a law regulating the sale of drugs may divide the list of drugs into schedules by name and the law may thereafter refer to the schedules without citing any particular drug, thus avoiding the objections to the use of definitions.[2] The use of this expedient will often materially shorten and make more perspicuous an act which would otherwise appear complicated and difficult to understand.

A frequent use of the schedule in England is in the listing of repeals. Where many acts or parts of acts are affected a carefully drawn schedule of repeals will aid much in keeping the law simple.

Care should be taken that the body of the act and the

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[1] *State ex rel. Att'y-Gen.* v. *Taylor*, 15 Ohio St. 137 (1864).

[2] For an example of the extended use of tabulation and schedules, see The Pharmacy Act, Laws of New York, 1910, ch. 422, p. 764.

schedule correspond, as it has long been the rule that if they are irreconcilable the body of the act will prevail, for the words of schedules are "received as examples, not as overruling provisions."[1] It is also urged against the use of schedules that to separate the lists of persons or things to which the law applies from the body of the act makes easy the mistake of applying rules in cases to which they would not be applied if the command and the subject were kept in conjunction, but this danger lies more in the scope of the law itself than in its form. Wherever a law applies to various classes it runs the danger of becoming, in some of its provisions, more comprehensive than its intent, and whether schedules are used or not, such measures necessitate unusual care in drafting. The converse danger is in fact quite as much to be guarded against — if schedules are not used it may easily happen that in the repetition of the lists of persons or things, inadvertent omissions may occur.

Schedules are preferably marked by letters of the alphabet, and subdivisions of schedules by the letters with small numerals, as A, B, C, a_1, b_1, c_1. This method of marking makes it easy to cite them without danger of confusion with sections of the act. The approved position for the schedule is at the end of the act. English practice shows few exceptions to this rule. In America, however, it is often put at the beginning. The former practice has the advantage of directing attention immediately to policy rather than details. It is argued for the latter that putting the schedule at the end misleads the legislator and that the meaning of the bill is not clear until the schedule is read at the end of the act. This objection is valid wherever the schedule becomes in fact a definition, but if this fault is avoided and

[1] *Reg.* v. *Baines*, 12 A. & E. 227 (1840).

reference to it is by its citation rather than by an index word, the English practice must be admitted to be superior. It may, it is true, necessitate a reference to the end of the act to determine the scope of the schedule, but the policy aimed at in the bill will stand out at once, an advantage not to be overlooked.

Forms

The attachment of forms to laws is a familiar expedient for prescribing the way in which duties, especially those of a ministerial character, are to be carried out by officers. They often save lengthy descriptions and make the law more easily obeyed than would be the case if the officer, often unaccustomed to legal phraseology, were forced to draft a form which would meet the detailed directions of the law. Of late years the prescribing of forms has been increasingly delegated to administrative officers, but they are still often appended to laws when there is no superior official to whom the duty of drafting them can well be entrusted, or where the description of the way in which an act is done or a document is to be drawn would be difficult. A common example of the use of forms is the insertion of blank ballots in legislation prescribing their character.[1]

Illustrations

Similar to the use of forms is that of illustrations. Indeed, a form filled out would be an illustration. Examples of this expedient are found in the election laws of many states which are accompanied by dummy ballots intended to illustrate the arrangement of names, method of marking and similar details which the law regulates.

[1] An example is found in Wis. Laws, 1911, ch. 332, also ch. 359 and 599. The election laws of the states contain numerous examples of forms.

A broader use of the illustration only occasionally met with in American laws is found where a concrete example of an abstract rule is given. Care should be used in such cases to make the illustration exact so as to avoid the danger of prescribing in it a rule at variance with the body of the act. An act can often be made much clearer by this expedient. It is especially to be used when the rule, though abstract, is to be followed by those who lack experience in the use of such rules. The following example illustrates the value of an illustration:

"Sec. 2. To ascertain the contents of a saw log or stick of round timber, first multiply the average diameter of the top of the log, inside the bark, in inches, by half such diameter in inches, disregarding fractions of an inch less than one half, and regarding fractions larger than one half as a full inch, and the number obtained as the product will represent the contents in feet of a log of that diameter twelve feet long. Then, if the log is less than twelve feet long, the actual contents of the log will be the same fraction of the above product that the actual length of the log is of twelve feet. If the log is more than twelve feet long, commence at the upper end and measure it off into as many sections, each twelve feet long, as the log will contain, then find, according to the rule given above, the contents of each twelve-feet section, by multiplying the diameter of the top of the section by half its diameter, and find the contents of the fractional section at the lower end (if the log does not divide evenly) in the manner provided above for finding the contents of a log less than twelve feet long. The aggregate of the contents of the sections will be the contents of the whole log.

"This may not lack certainty of expression and so far as certainty means clearness it may not lack clearness. But the quick apprehension of it by the general mind, if not by the judicial mind, would, it is thought, be facilitated by the addition of illustrations of its application, as follows:

ILLUSTRATIONS.

"1. A log is twelve feet long. The average diameter of the smaller end inside the bark is 14⅝ inches. Half the diameter is 7⅜ inches. Regard the diameter as 15 inches and half the diameter as 7 inches. Multiplying the diameter (15) by half the diameter (7), the product, 105, is the contents of the log in feet.

"2. A log is 7 feet 5 inches long. The average diameter of the smaller end inside the bark is 16 inches. Half the diameter is 8 inches. Multiplying the diameter (16) by half the diameter (8), the product, 128, is the contents of a log 12 feet long. The actual contents of the log are to 128 feet as the actual length (7⅝ feet) is to 12 feet. Working out this proportion (by multiplying 128 by 7⅝ and dividing the product by 12), the actual contents of the log are found to be 79 feet.

"3. A log is 41 feet long. The diameters at intervals of 12 feet, beginning with the smaller end, are 11, 15, 19, and 23 inches. The contents of the first, second, and third sections, calculated according to the first illustration, are respectively 66, 120, and 190 feet. The remaining fractional section will be 5 feet long and its contents calculated according to the second illustration are 115 feet. Adding the contents of the sections, the contents of the whole log are 491 feet."[1]

Language in which Bills are to be Printed

In only a few states has there been any attempt to regulate the language of statutes by constitutional provision. Even where rules are adopted they are in the main confined to prescribing that the laws be published in English only,[2] or to allowing or requiring the publication in addition to the English version of a translation in German, French [3] or Spanish, or Spanish and German.[4]

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[1] Quoted from Willard, Legislative Handbook, p. 161–2.

This expedient has been frequently used in the recent legislation on primary elections. See Laws of Nevada, 1909, ch. 198. Laws of Oregon, 1904, June 6 (adopted by initiative). Laws of Nebraska, Compiled Statutes, ch. 26, General Election Law, 1909. Laws of Kansas, 1908, House Bill 18, published Feb. 6, 1908. Wisconsin Laws, 1911, ch. 200. South Dakota Laws, 1909, ch. 247. Pennsylvania Pamphlet Laws, 1906, No. 10, approved Feb. 17, 1906. Michigan Pamphlet Laws, 1909, Act 281.

[2] Cal. 4, 24 (1879); Ill. Schedule, Sec. 18 (1870); Mich. 18, 6 (1850).

[3] La. 165 (1898).

[4] Col. 18, 8 (1876), until 1900 required. The House of Representatives of Hawaii by a rule requires every bill to be in the Eng-

Form of Bills

The form of bills has been properly left entirely in the hands of the legislatures. No feature of legislation presents greater diversity of practice than this. Few efforts have been made either by statute or by rules of the legislatures to regulate the condition in which bills may be presented, engrossed or enrolled.

In most states the rules of the houses say nothing about the forms of bills. They may presumably still be introduced even as rough drafts, with interlineations, and even in pencil. The entire lack of regulation in most states, and the brief provisions found in a number, that a bill cannot be received unless it is on "an entire sheet of paper," or on a paper "not less than half the size of foolscap," are eloquent of the need of the establishment of higher standards in the management of the mechanical side of our lawmaking.[1]

When bills are introduced without safeguards as to form, the chances of error and of improper tampering with the phraseology are much increased. Those who are interested in the defeat of a measure have greater

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lish language. Rules of the House of Representatives of Hawaii, 1911, p. 27, Rule 57.

[1] For examples, see Rhode Island Manual, 1911, p. 349, Joint Rules 12 and 13, requiring every bill to be "written with ink upon a full sheet of paper" and providing that the committees "may in their discretion order the printing of any petition, bill or other paper referred to them"; the Rules of the House of Representatives of Alabama, Session 1911, p. 15, Rule 43, forbidding receiving a bill "unless written on an entire sheet of paper"; the Standing Rules and Orders for the Government of the House of Representatives of Indiana, 1911, p. 28, 29, Rules 40 and 47, requiring that "every resolution of the House shall be written on not less than a full sheet of paper, and shall be signed by the member offering it. . . . All bills and joint resolutions ordered to be engrossed shall be executed in a fair, round hand."

opportunity to obtain its surreptitious alteration by changes introduced on the face of the bill by the committee, but not reported as amendments, or by corruption of the committee clerks or the engrossing or enrolling clerks. Some of the states are beginning to take greater precautions by requiring, for example, that the bill "be typewritten, accompanied by a carbon duplicate; one copy shall be marked and known as the 'original' and one copy marked and designated as 'printer's copy.'"[1] The former of these remains in the hands of the chairman of the committee to which it is referred,[2] to serve as a check upon the printer and to remove in this way one of the avenues through which bills have been known to be surprisingly changed in intent even though but slightly altered in form.

Still fewer states provide for any review of the form in which an act is drawn before it is put upon its passage. Even where safeguards of this sort exist they are often overridden, at least toward the end of the session when the tremendous pressure to force bills through destroys the protection at the time when it is most needed. A rule of this sort is that in Connecticut which requires all bills after passage by both houses to be referred to the Committee on Engrossed Bills, which may send them back for repassage with amendments which will improve their form.[3] In practice, under such a rule, bills will be sent back only if they are flagrantly lacking.

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[1] Iowa Official Register, 1911–12, p. 186, 187. Rules of the Thirty-Fourth General Assembly, No. 43.

[2] Or in either his hands or the hands of the Secretary of State. See Delaware practice in "Rules and Committees of the General Assembly of the State of Delaware, Session of 1909," p. 24, Rule 28.

[3] Connecticut Pocket Manual, 1911. Joint Rules, p. 101, Rule XIII. Some practice of this sort is usually observed even when no rule exists, but as here shown it is of less value than it appears.

Some review of this sort is needed to check up the mistakes and repetitions which have been introduced by amendments during the course of the bill through the legislature, but it alone is a very inefficient check on careless drafting. It applies the remedy too late, after the legislature has formally given its approval to the bill and at a time when the opinion of the members as to its wording has been crystallized. The ounce of prevention should be applied sooner. For this reason the Connecticut Legislature has adopted a rule requiring that before a bill be reported by a committee it must be submitted to the Clerk of Bills for revision.

The revision, to be effective, must take place early, preferably before reference to a standing committee or even before introduction. At this time the policy of the bill is fixed in the mind of its author, but no compromises have been made on the floor or in committee which make changes in phraseology difficult. A small number of states have adopted provisions of this sort. Vermont requires that "All bills intended for presentation by any member of the House shall first be presented to the Committee on Revision of Bills whose duty it shall be within three days after receiving each bill to examine and revise the same as to form and expression." [1]

The most detailed regulation of the form of legislation is that prescribed in the Joint Rules of the Legislature of Wisconsin. They are here given in detail to show the points upon which experience has shown that uniformity is needed both for convenience and safety. Especial attention should be given to the attempt to secure a high standard not only in the final form of the bill — the enrolled act, but also to the shape the bill

[1] Vermont Legislative Directory, 1911, Rules of the House, p. 378, Rule 26.

shall have on introduction and during its passage through the legislature.

"45. BILLS FIRST REFERRED TO COMMITTEE ON REVISION. In the Senate, before offering a bill, a member shall submit the same to the committee on revision, who shall return the same with their recommendations within forty-eight hours, Sundays and days of adjournment excepted. The member may, in his discretion, accept or refuse such recommendations. All memorials and joint resolutions providing for an amendment to the constitution shall be submitted to the committee on revision in like manner.

"Every bill offered in either house shall be announced and bulletined by the clerk and be referred, of course, to the committee on revision who shall ascertain if it complies with the rules, and enter its report thereof on the envelope and return the same to the clerk. When such bill is reported as in proper form, it shall be read the first and second times and referred to the proper committee. If not so approved it shall be immediately returned to the member offering the same. Any bill so returned may be re-drawn and re-offered. Unless otherwise ordered by the house, the report of the committee on revision shall not be entered in the journal.

"*Note.* The first paragraph of this rule applies to the Senate only.

"46. HOW BILLS TO BE DRAWN. 1. All bills shall be typewritten or printed on paper eight and one-half inches by eleven inches.

"2. The bill shall contain (*a*) its title, which shall specify the section of the statutes to be amended or added, unless the bill is of a local or temporary nature, and if an appropriation bill the words 'and making an appropriation therefor,' (*b*) the enacting clause, (*c*) section 1, etc. (subject-matter of bill), (*d*) enabling clause if required.

"3. Each section of any bill, except that of a local or temporary nature, shall, when practicable, begin substantially in one of the following forms:

"Section ——. Section —— of the statutes (of 1898) is amended to read: Section ——.

"Section ——. Section —— of chapter —— of the laws of —— is amended and made a section of the statutes (of 1898) to read: Section ——.

"Section ——. There is added to the statutes (of 1898) a new section to read: Section ——.

"The part in parentheses is obsolete.
(For Assembly.)

"3. Sections of the statutes shall be divided into sub-sections and sub-sections into paragraphs whenever exceeding the length herein prescribed for a paragraph. A standard paragraph, unless containing only a single sentence, table or schedule, shall consist of not more than fifteen lines.

"4. The bill shall show any matter to be omitted with a line drawn through the same, and all new matter by underscoring or italicizing. (For Assembly.)

"5. The numbering of Sanborn and Sanborn's supplement shall be used as a guide in giving numbers to new sections or to sections of laws enacted since the adoption of the statutes of 1898.

"6. Sections to be inserted between two former sections shall be assigned letters and figures according to a plan providing for an expansive system as follows:

925	925	925	925	925
925m	925g	925d	925b	925a
926	926m	925g	925d	925b
925	925m	925t	925x	925y
925m	925t	925w	925y	925z
926	926	926	926	926

and to fit rare instances when the letters cannot be used:

925	925	925	925z
925.5	925.3	925.1	925.5
925a	925.5	925.3	926

"7. The title to bills shall be substantially in one of the following forms:

"'A bill to amend section —— of the statutes relating to —— (and making an appropriation) (and providing a penalty).'

"'A bill to create section —— of the statutes relating to —— (and making an appropriation) (and providing a penalty).'

"*Note.* The following is the form in which the bills are required to be written under the foregoing rules. It should be especially

noted that the size of the paper to be used is eleven by eight and one-half inches; that the bill must be in duplicate, and that the paper shall not be folded.

"A bill to amend section 440 of the statutes relating to textbooks for use in common schools.

"The people of the state of Wisconsin, represented in the Senate and Assembly, do enact as follows:

"Section 1. Section 440 of the statutes is amended to read: Section 440. When textbooks have been adopted they shall not be changed for *a period of three* years."[1]

These rules, when supplemented by an efficient official drafting department, will go far toward insuring that the form of bill shall be uniform, that tampering with the phraseology will be eliminated, that the bills will be phrased in proper language and that the danger of clash with our multitude of constitutional limitations will be reduced to a minimum. It must be remembered, however, that regulations of the form of the body of statutes whether found in rules of the legislature or in statute, are directory only. The constitutions have not and can not properly enter this field and anything less than a constitutional rule has no binding force, for an offending statute would stand on as high authority as the rule itself. For insistence on good practice we must rely on the legislature alone.

Sectioning

The first rule of practice as to the form of the body of the bill, is that it be divided into convenient sections. A bill printed solid has the disadvantage of a page without paragraphs. The author of a measure, if he has nothing

[1] Official Directory and Legislative Manual, Wisconsin, 1911. Rules 45 and 46, pp. 86–90. A portion of the rules for the Senate is here omitted.

to conceal from the legislature, will seek to make the purpose stand out clearly by dividing the text in accordance with the policy he wishes to have declared law. How long these paragraphs should be must be determined by the subject-matter.

By the Federal statutes each section of a bill must be numbered and contain as nearly as may be a single proposition of enactment.[1] But little attention is paid to the law, for many of the paragraphs of Federal statutes are long and contain entirely unrelated subjects. A similar direction applying to legislation in one state has already been noted. The contrast in the extent to which the two rules are observed is largely due to the lack of any agency in the Federal government to attend to the technique of the printing of bills.

The advantages of judicious sectioning are clear. The reader can more easily grasp the meaning of the act; the discussion of the bill can be more easily directed to its various parts. If amendments are to be introduced during the course of a bill to passage or subsequently, they can be more easily inserted and, not the least of advantages, the draftsman himself will find it easier to co-ordinate his thoughts when a definite scheme or framework for the bill is kept in mind.

Another advantage of proper sectioning is found in states in which the constitution requires the section amended to be printed when an amendment is made. If a change of only a few words is made it is obviously unnecessary to print all of a section extending over several pages and containing unrelated provisions. Convenience dictates short sections, especially in social legislation which from its nature must be subject to frequent re-casting.

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[1] Rev. Stat., sec. 10.

Sentences

As a rule sentences should be short. Dependent clauses should be avoided and pronouns should be kept close to their antecedents. Long sentences are not objectionable where a large number of cases must be stated to which the same conditions apply. Much can be done to promote clearness by skill in avoiding parenthetical constructions. Compound sentences where the same sense can be carried without the use of conjunctions are to be avoided.

Tabular Construction

American legislatures have not availed themselves of the advantages that may be gotten by breaking up the body of an act into its parts and displaying them in a tabular arrangement. Clearness is materially increased by this expedient. An English or a French act is more perspicuous than an American one, due in no small degree to this device of appealing to the eye to show the co-ordination of the subject-matter. An example of this sort of arrangement is the following:

CHAPTER 17.

An Act to enable the London County Council to establish and maintain an Ambulance Service in London.

(20th October, 1909.)

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. It shall be lawful for the London County Council to establish and maintain, or to contribute towards the cost of, or otherwise to aid in establishing or maintaining, an ambulance service for dealing with cases of accidents or illness (other than infectious diseases) within the county of London, exclusive of the city of London, and for such purposes —

(1) To employ such persons as they may think expedient.

(2) To appropriate any lands and buildings for the time being vested in them.

(3) To acquire any lands or buildings within the county.

(4) To erect, maintain, and manage, on any lands so appropriated and acquired, any buildings for the said purpose.

(5) To adapt, furnish, and equip any buildings so appropriated, acquired, or erected.

(6) To contract with the postmaster-general for the establishment and maintenance of telegraphic, telephonic, and other suitable means of communication.

(7) To provide and maintain ambulances and other vehicles and means of conveyance, to be drawn by electrical or other mechanical power, by horse, or by hand.

Provided that any electrical power used for moving any such vehicle shall be entirely contained in and carried along with such vehicle.

2. The London County Council may allow the ambulance service established under this Act to be used, on such terms and conditions as may be agreed upon, by any local authority having powers under section fifty of the Public Health Acts Amendment Act, 1907.

3. This Act may be cited as the Metropolitan Ambulances Act, 1909.[1]

Examples of this arrangement are found in the current statutes of all the English colonies and in the German and French legislation. New York, among American states, uses tabulation to the best advantage.

Where a succession of duties, privileges or liabilities is referred to a single person or group, space may often be saved and the meaning made more clear by adopting this method of setting out the law on the printed page. Especially if amendment of certain provisions is probable during the progress of the bill through the legislature or subsequently, it will be advisable to set the divisions out as *separate sections* of the bill.

[1] From the Law Reports — The Statutes — Vol. 47, 9 Edw. VII, 1909, ch. 17, p. 86.

An example of a law using tabulation, but in which the divisions are not sections, follows: [1]

Sec. 71. DUTIES IMPOSED. — It shall be the duty of every railroad corporation operating its road by steam:

1. To lay, in the construction of new and in the renewal of existing switches, upon freight or passenger main line tracks, switches on the principle of either the so-called Tyler, Wharton, Lorenz, or split-point switch, or some other kind of safety switch, which shall prevent the derailment of a train, when such switch is misplaced or a switch interlocked with distant signals.

2. To erect and thereafter maintain such suitable warning signals at every road, bridge, or structure which crosses the railroad above the tracks, where such warning signals may be necessary, for the protection of employees on top of cars from injury.

3. To use upon every new freight car, built or purchased for use, couplers which can be coupled and uncoupled automatically, without the necessity of having a person guide the link, lift the pin by hand, or go between the ends of the cars.

4. To attach to every car used for passenger transportation an automatic air brake or other form of safety power brake, applied from the locomotive, excepting cars attached to freight trains, the schedule rate or speed of which does not exceed twenty miles an hour.

5. To provide each closed car in use in every passenger train owned or regularly used upon a railroad, with one set of tools, consisting of an axe, sledge hammer, crowbar and hand saw, and such other or additional tools as the public service commission may require, to be placed where directed by the commission.

6. To provide in each passenger car, where the line of road shall exceed forty continuous miles in length, a suitable receptacle for water, with a cup or drinking utensil attached upon or near such receptacle, and to keep such receptacle, while the car is in use, constantly supplied with cool water.

Every corporation, person or persons operating such railroad, and violating any of the provisions of this section, except subdivision six, shall be liable to a penalty of one hundred dollars for each offense, and the further penalty of ten dollars for each day that it

[1] Laws of New York, 1910, ch. 481, sec. 71. Birdseye's Cumming and Gilbert's Consolidated Laws of New York, Supplement (1910).

shall omit or neglect to comply with any of such provisions. For every violation of the provisions of the sixth subdivision of this section every such corporation shall be liable to a penalty of twenty-five dollars for each offense.

Arrangement of the statute in this way is to be recommended where the subject-matter makes short sentences impossible. The relation of the main and the dependent clauses, and the relation of the subject to its various predicates can in no other way be so clearly brought out.

CHAPTER XVI

PENALTIES

The increase of detailed regulation of legal relations presupposes that the rules laid down are, except where otherwise declared, intended to be mandatory. Statutes are phrased except in unusual cases, as commands, not as counsel. Commands are obeyed primarily because of the sanction attached to their neglect. Social loss of standing through the notoriety of the act, money loss or loss of freedom are the expedients generally used to force observance to the law.

The tendency in all civilized countries has been toward lessening the severity of legal penalties. It is found that extreme harshness in a sentence arouses the public sympathy in favor of the delinquent instead of against him. The element of vengeance even as a manifestation of the righteous wrath of the community has disappeared from the philosophy of punishment.[1] Not only does the deterrent influence of the penalty not increase in proportion to its severity, but where justice depends on the jury and popularly elected judges, it is found that if penalties are too heavy convictions will be few, for if public opinion will not support the law it is enforced in only a half-hearted way or not at all.

Penalties

Of all expedients for enforcing law the most ancient and still the most popular is the money fine or imprison-

[1] But see Salmond, Jurisprudence.

ment. It is the easiest to adjust to the law; in the mind of the public it is a measurable sacrifice which the legislator looks upon as great enough to make the lawbreaker prefer the good rather than the evil. Too often the punishment is still thought of by legislator and citizen as an expiation to society for the wrong done; and the same with the offender — he tends to look upon the penalty at best as a squaring of accounts, at worst as an unfair exaction which gives him a score to settle against the community.

To a far greater extent than is apparent, it is true that severe penalties are an encouragement to crime. This is not an argument from a standard of false humanitarianism, for the serious crimes *ought* to be severely punished, but it is an argument of expediency. It is of small advantage to have a long term of imprisonment prescribed for a certain act, if those who commit the act commonly escape its operation. The argument nominally for lesser penalties may in fact be one for punishments actually more severe. It is so here. Punitive legislation aims to secure the greatest sum of deterrent influence, and a law which enabled the state to punish ninety per cent of the offenders by a punishment of four years' imprisonment would normally be preferable to one which, though it punished with a penalty of six years' imprisonment, reached only sixty per cent of the criminals. The sum of punishment might nominally be the same; the surety of punishment would be fifty per cent greater in the first case and the deterrent influence of the two laws would be even more widely at variance.

There has been much discussion in Europe of a scale of penalties carefully adjusted to the character of the offense, but there has been little actual work toward any logical standard in America. The penalty for each crime in the United States is fixed by the opinion of

the legislature, when the bill is passed, often indeed by the individual opinion of the man who originally sketches its provisions. Little effort is given to balancing penalties. There is no consistent attempt to make the severity of the different penalties within a given state bear a proper relation nor do the punishments for the same offense in different states approximate one another. A few examples will illustrate the illogical and chaotic condition of this feature of our law.

It seems axiomatic that in a group of states still following, with a few exceptions, the principles of Anglo-Saxon jurisprudence the penalties for different offenses should be similar. The measure of the penalty, we are told, is that prompted by protection to society. Where a flexible penalty is provided it is for the judge to decide whether the circumstances of the individual case justify leniency or severity. The maximum penalty will indicate or should indicate the sense of the community as to the seriousness of the wrongdoing. Often, indeed as a rule, the maximum penalty is the only positive measure which the legislature gives to estimate the seriousness of the offense. The following are only scattering examples taken from among many to show the wide variance in our penal laws, a variance to be explained by caprice and the lack of any well considered juridical standards rather than by the varying needs of the commonwealths.

The maximum penalty for counterfeiting in Delaware is three years; in New York [1] it is twenty years. In New Hampshire perjury may be punished by imprisonment for five years,[2] in Maine, for life.[3] In Missouri

[1] Laws of New York, 1892, ch. 662.

[2] Public Statutes and Session Laws of New Hampshire, 1901, ch. 280, sec. 1.

[3] Revised Statutes of Maine, 1903, ch. 123, sec. 1.

the maximum penalty is death if the witness sought to effect the execution of an innocent person.[1] The maximum for incest in Virginia is six months,[2] in Louisiana the only penalty was formerly imprisonment for life, now the maximum is twenty years.[3] Arson in the daytime of a building not a dwelling may be punished in Kansas by imprisonment for four years,[4] in Maryland in certain instances the maximum is death.[5] The maximum penalty for arson of other than an inhabited building with intent to defraud an insurer, in Alabama is only one year and a fine of $2,000. In Maine the penalty for the offense is imprisonment for any term of years.[6]

These examples show that though the character of the act measures the penalty, we have no accepted standard of measurement. The comparisons are made on the basis of the *maximum* penalty. They are therefore not indicative of the degree of punishment usually inflicted, but of a lack of a logical standard in fixing penalties. The relative estimates of crimes in different states present similar contradictions. The guilt of rape in New York[7] is twice that of incest; in

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[1] Revised Statutes of Missouri (1909), Vol. 2, sec. 4345.

[2] Virginia Code Annotated (1904 Pollard), Vol. II, sec. 3783.

[3] Constitution and Revised Laws of Louisiana (1904 Wolff), Vol. I, p. 321, sec. 789, laws of 1855 and 1884.

[4] General Statutes of Kansas (1909 Dassler), p. 577, secs. 2546 and 2548.

[5] Public General Laws of Maryland, 1904, Vol. 1, Art. 27, sec. 9.

[6] Revised Statutes of Maine, 1903, ch. 120, sec. 1, p. 916.

[7] The comparisons continue to be made on the basis of the maximum penalty. Rape not more than twenty years. Birdseye's Cumming and Gilbert's Consolidated Laws of New York, Vol. 3, sec. 2010, p. 4073. Incest not more than ten years. *Ibid.*, sec. 1110, p. 3938.

Pennsylvania it is five times as serious an offense.[1] The guilt of perjury in Indiana is equal to that of incest;[2] in Kentucky the maximum guilt of incest is to that of perjury as twenty-one to five.[3] In Virginia bigamy may cause imprisonment for eight years,[4] incest for only six months;[5] in Colorado incest in certain cases may result in a twenty-year sentence,[6] but bigamy for only two years.[7]

It is not to be overlooked, of course, that the difference between the actual sentences for the same crimes in the different states is not as a rule so great as the difference in the possible sentences, but this comment does not detract from the argument that our legal standard of measurement is a faulty one.

Difficulties of Enforcing Penalties

At least four difficulties with their combinations make difficult the enforcement of penalties, especially when they are not considered by public sentiment to be justified:

I. Difficulties in prosecution.

II. Witnesses may hamper the court proceedings by their unwillingness to testify.

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[1] Rape, not more than fifteen years and $1,000 fine. Incest, not more than three years and $500 fine. Purdon's Digest, Vol. 1, sec. 1004, p. 4073, sec. 442, and p. 966, sec. 280.

[2] Burns' Annotated Indiana Statutes, Revision of 1908, Vol. 1, secs. 2376 and 2352.

[3] Incest, twenty-one years; perjury, five years. Statutes of Kentucky (Russell, 1909), secs. 3681 and 3707.

[4] Virginia Code Annotated (Pollard, 1904), Vol. 2, sec. 3781.

[5] *Ibid.*, sec. 3783.

[6] Mills, Annotated Statutes of Colorado, Vol. 1, 1890, sec. 1322. See sec. 1321 for the usual incest law of Colorado.

[7] *Ibid.*, sec. 1317.

III. Jurors may not be willing to convict.

IV. The judge, especially if elected for a brief term, may cater to public opinion by inflicting the minimum penalty, rather than the one which the facts adduced would counsel.

I. Difficulties in Prosecution

1. Large numbers of laws rest unused in the statute books because they were passed to relieve a flagrant local abuse, but their existence remains unknown to those not interested in the original enactment. Since the wrong ordinarily reaches the prosecuting officer only on a citizen's complaint, old wrongs may continue, not through inaction or hostility of those who should protect the public but because the public does not know its rights and makes no complaint to the authorities. The extent to which not only the public but legislators themselves are often ignorant of the remedies in existence is shown by the frequent introduction of bills to authorize things already covered by acts in force.

2. Probably the most serious hindrance to efficient law enforcement is the failure of the public prosecutors to prosecute even when they know the law has been broken. Their inaction may have various causes. When the cases would bring no credit to the prosecutor other than that which comes from faithful execution of duty he may lack zeal because of the tedium which the prosecution would involve, or he may honestly feel that the result of the prosecution would not justify placing upon the county the costs which it would involve even though the violation of the law be clear.

But if popular opinion is indifferent or hostile to the enforcement of the law additional excuses present themselves. The prosecutor may conclude that if the constituents who elected him are not in favor of the law

it should not be enforced, but the district attorney should allow a species of informal local option to develop. If local public opinion is actively hostile the district attorney may conclude that what the people want should be granted, especially since it coincides with what is best for his own political fortunes. Whether he be ambitious for re-election or for political advancement, he will not be disposed to enforce an unpopular law which will jeopardize his own personal fortunes. The shorter the term the greater will be this defect. The efficient enforcement of the law depends on the independence of the prosecuting officer as well as on the independence of the judge, and an officer who is subject to recall at the end of a short term — often two years, cannot be expected to be entirely free from anxiety about "political fences."

The district attorney is the first court and if he decides against the prosecution of a claim, it often lapses. He is to exercise his discretion, he determines what cases he is to present to the grand jury as a rule, or, if he can present the case to the court without action by the grand jury, he is not to prosecute a case in which there is no probability of securing a verdict. If he alleges that the case should not be prosecuted it is often an effective bar to an action. If he acts in good faith this rule is beneficent; if he acts in bad faith it is hard to prove that he does so to such an extent that he can be removed from office.

Statutes frequently aim to overcome the failure to prosecute by specific declarations that the public prosecutors "shall prosecute" all cases arising under the acts. The clauses are valueless since in any case the prosecutor must be left to judge whether a case can be made out, and since this is so, the provision adds nothing to what was already the officer's duty.

Occasionally the laws attempt to go farther and give specific punishment for failure to carry out the duty of the office, or statutes are passed to protect the office from corrupting influences. An unusual provision of this sort is found in a law of Oklahoma which forbids any officer to receive "for himself or for another or for the state, county, city or town, or municipal organization" any "property, money or thing of value" for the privilege of violating the law. A criminal penalty is set for the officer who disobeys the command.

Various other expedients have been tried, with more or less success, to insure the prosecution of cases.

Private Civil Suits for Penalty

A class of laws long known to English jurisprudence is that by which any individual or private corporation may sue for a money penalty in a civil suit in which the individual or corporation becomes the responsible plaintiff. At first sight this seems a valuable expedient. It puts the expense of costs in case the suit is unsuccessful on him who brings the suit — thus freeing the state; and every citizen has a pecuniary interest in enforcing the law. In practice these advantages are deceptive. No suit will be brought unless there is a substantial amount to be gained, and the person who brings the suit must put himself in a weak if not indefensible moral position. He cannot stand before the court as one anxious only to see justice done, but he appears as one seeking a conviction, that he may make a profit out of the wrongdoing of others. Liability for damages discourages the bringing of suits; and the moral weakness of the accuser's position makes it likely that justice will go hand in hand with malice. When this sort of prosecution is provided in case of laws to which a small penalty is attached it becomes practically a guarantee

that the law will not be enforced.[1] It has in fact at times been a last resort of the lobbyist, who, failing to stop the passage of a bill, adopts this means of rendering it powerless. The extent to which this method of law enforcement is used in the various states varies greatly. An example from the Federal statutes is the law forbidding any one to make and utter business cards in the likeness of a government bond or national bank note, the penalty being "recoverable one-half to the informer."[2] Under the North Carolina code when an act provides for imposing a penalty but does not designate to whom the penalty is to be given, the courts hold that it may be recovered by any one who will sue for it for his own use.[3] Modifications of this expedient are found in laws which provide that the penalty shall go one-half to informer and one-half to the party aggrieved,[4] or one-half to the state and one-half to the informer.[5]

In New Jersey any person manufacturing peach baskets of other than standard size and failing to brand them with a statement of their capacity is subject to a fine of twenty-five to fifty dollars to be recovered by the public prosecutor in the name of the state. One-half of the fine is to be paid to the informer and one-half to the support of the poor of the county in which the recovery is had.[6] The regular penalty in New Jersey for the

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[1] In some cases the amounts recovered may be large. Under sec. 3491, U. S. Comp. Stat. 1901, a recovery of $23,576 is noted. *U. S.* v. *Griswold*, 30 Fed. 762 (U. S. 1887).

[2] U. S. Comp. St. 1901, pp. 2482, 2384.

[3] *Carter* v. *Wilmington & W. R. Co.*, 36 S. E. 14 (N. C. 1900).

[4] *Lewis* v. *Stein*, 16 Ala. 214 (Ala. 1849).

[5] Neb. Comp. Stat. 1893, c. 16, sec. 104. *Omaha & R. V. R. Co.* v. *Hale*, 45 Neb. 418 (Neb. 1895). See also, Public Statutes and Session Laws of N. H., 1901, p. 395, c. 126, sec. 23.

[6] Pamphlet Laws of New Jersey, 1908, p. 547.

enforcement of standards of weights and measures, purity of foods, and a large number of similar laws, is this private civil suit, half the penalty going to the informer. The same expedient is used for the enforcement of the factory acts.

A recent comprehensive statute of this sort with peculiar provisions for securing payment of the judgment, is the New Jersey law punishing the sale of milk below standard quality:

"37. Penalties for violations of acts; action therefor; procedure; execution; imprisonment for non-payment. — Sec. 4. Any person violating any of the provisions of this act shall be liable to a penalty of fifty dollars, to be recovered in an action of debt, before the small cause court or district court, by any person who may desire to sue therefor, who shall be designated in the state of demand and summons as plaintiff, and when recovery is had such penalty shall be paid to the county collector of the county in which the said violation occurred. It shall be unnecessary in proceedings brought under the provisions of this act to note the commencement of said suit or to endorse the process as in ordinary *qui tam* or actions brought by a common informer. When judgment shall be rendered against any defendant other than a body corporate, execution shall be issued against his goods and chattels and body without any order of the court for that purpose first had and obtained. If the officer executing any such writ shall be unable to find sufficient goods and chattels of the said defendant in his bailiwick whereof to make the amount of said judgment and cost of said suit, he shall take the body of the said defendant and deliver him to the keeper of the common jail of said county, there to be detained until discharged by the court in which such judgment was obtained or by one of the justices of the supreme court, when such court or justice shall be satisfied that further confinement will not result in the payment of the said judgment and costs. In case judgment shall be rendered against a body corporate, execution shall issue against the goods and chattels of such body corporate as in other actions of debt." (P. L. 1907, p. 387.)[1]

[1] Compiled Stat. of N. J., Vol. 4, p. 5855, sec. 37.

To encourage suits by removing the danger that the informer will have to bear costs, it may be provided that he may have the public prosecutor handle the case though the reward shall still be his.[1] The public prosecutor may be rewarded for doing his duty by being allowed to sue for the penalty as any other person.

A law of Indiana requires railway companies to keep a bulletin posted showing whether trains are on time and provides penalties for each violation. The penalty may be recovered by the prosecuting attorney, who keeps one-half of the amount obtained.[2]

Care should be taken in drafting such laws not to offend constitutional provisions that all fines collected in certain sorts of suits shall go to certain funds. Under such provisions it is usually possible to word the law so that part of the penalty will go to the informant, but there must be some balance which will go to the fund.[3]

Public Civil Suits for Penalties

A stronger method of enforcement of civil penalties than the private civil suit is found in placing the beginning of the suit beyond the control of the local prosecutor, or in giving it to him and to other persons. The use of this method of enforcing the laws is bound to grow with

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[1] *State ex rel. Clay Co.* v. *Wabash St. L. & P. Ry. Co.*, 1 S. W. 130 (Mo. 1886).

[2] Laws of Ind., Mar. 9, 1889, Rev. Stat. 1894, secs. 5186–7.

[3] Under Const., Art. 10, sec. 2, setting apart for the school fund "the clear proceeds of all fines collected in the several counties for any breach of the penal laws," a law which gives the entire penalty to the claimant is void, because it admits of no "clear proceeds" which can come to the state for the school fund. An act which awards an informer a share can only be sustained, if at all, on the ground that it is a mode which the legislature may employ of collecting the share awarded to the state. *Dutton* v. *Fowler*, 27 Wis. 427 (Wis. 1871).

the supervision by the state of an increasing number of public interests, the growing use of state administrative boards, and in general the spread of the so-called "social legislation" which cannot be enforced if left to individual initiative, local public opinion, and prosecuting officers. Health regulations, police affairs, factory acts, school attendance laws and similar measures are things which, though primarily of local interest, are coming to be supervised more and more through central administrative agencies which are given a power to bring suits usually concurrent with that held by the local authorities.

The extent to which the local authority is to be supervised, controlled or replaced must be decided by the individual case. It may be best merely to put the regular officials under the control of other persons or officials, transferring their discretion to bring suit to these other authorities but leaving the carrying out of the suit itself in their hands.

In other cases it will be considered better to give to other officials the power to institute the suits themselves in the name of the public and to take the control of the suit out of the hands of the usual prosecutor. Of these laws there are numerous examples in every state. An example is the New Jersey statute requiring that seats be furnished for female employees in mercantile establishments. The commissioner of labor and his authorized deputies are authorized to bring suit for the recovery of the civil penalty in the name of the commissioner. All money collected is paid into the state treasury.[1]

The development of the more formal commissions which has been so marked a feature of state and national legislation in the last two decades is a further elaboration of this expedient. The individual, it is recognized, often

[1] Pamphlet Laws of New Jersey, 1909, pp. 221–222.

has no real equality before the law when he merely has the right to bring his suit through the usual channels of civil process. The state has created the commissions to help him prosecute his case, to stand beside him not only as next friend, but as a party in interest to insure that the issue shall be tried, and tried on its merits.[1]

Criminal Suits not Controlled by Usual Prosecutors

In criminal suits also, where the regular prosecutor will not act, it is possible to force him to bring suit at the request of some other person or official, or to give other officials power independently to institute criminal proceedings. Varieties of these expedients are illustrated in the following laws:

A Kansas statute allows the prosecuting witness in any criminal action to employ at his own expense an attorney to assist the county attorney in any criminal action under the laws of Kansas, and no prosecution is dismissed over the objection of the associate attorney until the reasons of the county attorney and the objections thereto have been filed in writing, argued by counsel and fully considered by the court.[2] A later Kansas statute provides that in any criminal prosecution in a county having less than ten thousand inhabitants, the prosecuting witness may apply to the court or judge thereof for the appointment of an attorney to assist the county attorney, and the court, if it deems it proper, may appoint such an assistant, who is paid out of the county treasury.[3]

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[1] For an excellent discussion of the Commission as an enforcement expedient see Charles McCarthy: The Wisconsin Idea. Macmillan, 1912, ch. 3 and *passim*.

[2] Laws of Kansas, 1901, ch. 62, sec. 1.

[3] Laws of Kansas, 1903, ch. 66, secs. 1 and 2.

In Oklahoma suits for violation of the liquor laws may be brought by state officers, county officers, and by any citizen of the county who supports the statement of violation by an affidavit. An additional inducement to bring suit is held out to local prosecuting officers and to citizens, in that if they do so all fines recovered go to the road and bridge fund of the county, while if the state officials bring the suit only one-half of the funds recovered go to that purpose.[1]

A Kansas law on gambling puts this means of enforcement in the following language:

"Whenever the county attorney shall be unable, shall neglect or refuse to enforce in his county the laws of this state relating to gambling or for any reason whatever such laws shall not be enforced in any county, it shall be the duty of the attorney general to enforce the same in such county and for that purpose he may appoint as many assistant attorneys general as he sees fit . . . and for such services he or his assistants shall receive the same fee that the county attorney would be entitled to for like services." [2]

This expedient has long been used in Kansas, especially in connection with the enforcement of liquor legislation.[3]

Special Prosecuting Officers

The appointment of special prosecuting officers independent of the usual public officers is met with occasionally. In Vermont a law of wide application takes the control of the suit out of the hands of the regular prosecutors. When twenty or more voters of a town

[1] Laws of Oklahoma, 1907–8, pp. 704–5 (2613, sec. 27).

[2] Laws of Kansas, 1907, ch. 263, sec. 4. Relating to enforcement of the gambling law.

[3] Laws of Kansas, 1885, ch. 149.

petition the governor in writing, alleging that the criminal laws are not enforced because of the neglect or inefficiency of the local prosecuting officers and praying for the appointment of special prosecutors, the governor may appoint one of the legal voters of the town as a special prosecutor of criminal offenses. These officers appear in the same sort of cases and are entitled to the same fees as town prosecuting officers and may appear in county and supreme courts in prosecutions instituted by them. They control the trial and disposition of the cases instituted by them, but in the higher courts the county attorney assists.[1]

For the better enforcement of the liquor laws of Oklahoma it is provided that the governor may appoint a state enforcing officer who "has all the power of county attorneys in their respective counties." The enforcing officer holds "office during the pleasure of the governor" and besides the liquor laws his duties may at the governor's discretion be extended to the other laws of the state. In place of or in addition to appointing this officer the governor may call upon the attorney general or his assistant to perform the service.[2]

Special Inducements to Sue in Criminal Cases

As in civil cases the converse policy may be adopted; the citizen or the regular prosecuting officer or both may be induced to see to it that the law is enforced by giving unusual inducements to bring suit.

In Kansas any county attorney who secures a conviction under the liquor laws of the state is allowed "a fee of twenty-five dollars upon each count upon which the defendant shall be convicted and the same shall be

[1] Public Statutes of Vermont, 1906, p. 476, ch. 110.

[2] Laws of Oklahoma, 1907–8, p. 612.

taxed as costs in the case, but the county shall in no case be liable therefor. Upon all sums collected by the county attorney on forfeited recognizances under the provisions of the act he shall receive twenty per cent."[1] If the suit fails the costs are paid by the county.

II. Unwillingness of Witnesses to Testify

Witnesses may prove quite as effectual a bar to law enforcement as poorly drafted laws or indolent or hostile prosecuting officers. Local influence when arrayed against the law makes it practically impossible to secure its general observance. Those who testify are themselves perhaps opposed to the rule or may find themselves charged with the same delinquency. The feeling of neighborliness may influence witnesses to be ignorant of the wrongdoing or to shade their testimony so as to make conviction impossible. To testify to the facts, even though the witness may have no sympathy with the accused, may cause local enmities which both parties want to avoid. The difficulty runs through much of our law, especially when it refers to an act which though *malum prohibitum* is not *malum in se*. Corrupt practices laws, game laws, and liquor laws furnish illustrations of the difficulties constantly encountered.

In some cases it is possible to reduce the difficulty under which the state labors by shifting the burden of proof. Some objective circumstance is made prima facie evidence of guilt and is sufficient to justify a conviction unless the defendant can prove that the condition was one which was not only not inconsistent with innocence but was in the particular case an innocent condition.

[1] General Statutes of Kansas, 1909, p. 983, sec. 4377.

Such laws are numerous in all states; illustrations are the following:

"The possession or having under control any bird, animal or fish of any of the kinds for which a close season is prescribed by law except as is thereby otherwise provided shall be prima facie evidence that it was the property of this state when taken, caught or killed and that it was taken, caught or killed unlawfully, and the defendant shall have the burden of proving the contrary." [1]

A pure food law in which the expedient is used is this following:

"No person shall manufacture for sale within the state or offer or expose for sale, have in possession with intent to sell, or sell or exchange any ground buckwheat containing any product of wheat, corn, rice or other foreign substance unless each and every package thereof shall be distinctly branded or labeled in letters not less than one-half inch in length with the name of the maker and factory and the location of such factory and the words "Buckwheat Flour Compound." . . . . Any brand or label herein required shall be an inseparable part of the general or distinguishing label. . . . The having in possession of any buckwheat flour compound which is not branded or labeled as hereinbefore required and directed upon the part of any person engaged in the public or private sale of such article shall for the purpose of this act be deemed prima facie evidence of intent to sell the same." [2]

A game law of Wisconsin reads:

"The possession upon any inland water, or upon the

[1] Wisconsin Statutes of 1898, Sanborn & Berryman, Callaghan & Co., Chicago, 1898, sec. 4565e.

[2] Laws of Wisconsin, ch. 187, 1905.

shores or islands of inland waters, of any dynamite or other explosives shall be prima facie evidence that the same is possessed for an unlawful purpose." [1]

In the enforcement of game laws it is often found a useful expedient to forfeit the property to the state in case it is found under circumstances which indicate intent to violate the law. Such are the laws forfeiting decoys set out at a time when their use is prohibited, and forfeiting boats used in blinds.[2]

An important expedient for overcoming unwillingness of witnesses to testify is to destroy the liability for prosecution which the answers may disclose.[3] The fifth amendment to the Federal constitution reads, "Nor shall any person be compelled in any criminal case to be a witness against himself." State constitutions frequently contain similar provisions. It was early decided that the provisions of the Federal constitution apply only in Federal cases and not to a witness testifying in the state courts: as the first ten amendments to the constitution are limitations only upon powers of Congress [4] and the Federal courts and do not apply to the states except as the fourteenth amendment may have made them applicable.

Except as the state constitutions guarantee the privilege, it is therefore within the power of the state legislatures to force a witness to testify even against himself.[5]

[1] Laws of Wisconsin, 1905, sec. 7, ch. 489.

[2] See Laws of Wisconsin, ch. 312, sec. 25, 1899, and ch. 437, 1903.

[3] The number of these statutes is great and increasing, an example is Wisconsin Statutes Supplement, Sanborn and Sanborn, 1899–1906, p. 1378.

[4] *Barron* v. *Baltimore*, 7 Peters 243 (1833); *Presser* v. *Illinois* (1886), 116 U. S. 252.

[5] The advisability of abolishing this immunity in the states which have it in their constitutions has been frequently urged.

Even under state guarantees it is possible to destroy the privilege of silence by creating a substitute for that right which in its protection to the citizen will be as broad as the original guarantee. This is the basis of the immunity statutes.

It is well established that the privilege of silence does not extend to a witness when the facts to which he is to testify could not possibly be made the ground for a criminal prosecution against him, as where the act has been pardoned or is barred by the statute of limitations. But on other points the courts have not been uniform in the interpretation of the laws intended as substitutes for the constitutional privilege.

One line of decisions holds that before the legislature can take away the privilege of silence it must grant the witness absolute amnesty for the offense concerning which he is to testify. The possibility of any prosecution of the witness for the act must be entirely removed.[1] The other line of cases holds that a witness can not claim the privilege where he is exempted from liability for an offense concerning which he is compelled to give evidence, or from any prosecution or any penalty or forfeiture on account of any transaction to which he may testify.[2] The distinction between this standard and the previous one is indicated in the argument in *Counselman* v. *Hitchcock*. The statute was held to fall short of the constitutional provision because the disclosure of the circumstances, source and means of the offense might be used effectively in a subsequent prosecution against the witness for participation in the very offense then on

[1] *Cullen* v. *Commonwealth*, 24 Grattan 624 (1873); *Emery's Case*, 107 Mass. 172 (1871); *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892).

[2] *Floyd* v. *State*, 7 Texas 215 (1851); *Ex parte Cohen*, 104 Cal. 524 (1894); *Brown* v. *Walker*, 161 U. S. 591 (1896). Compare this case with *Counselman* v. *Hitchcock*, 142 U. S. 547, cited *supra*.

trial though his answer on the witness stand might not be used as evidence.

In the federal courts this question is now settled. In *Counselman* v. *Hitchcock* the immunity declared by the statute was that "No evidence given by the witness shall be in any manner used against him in any court of the United States, in any criminal proceeding." [1] The court held that the statute was not as broad as the constitutional guarantee and the witness could refuse to answer for the reasons quoted above. Congress then amended the immunity law by the act of February 11, 1893, which in certain cases took away the constitutional privilege of silence when incriminating questions were asked, by substituting a guarantee that "No person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise." This the supreme court held was a sufficient substitute for the constitutional guarantee and creates an absolute immunity. The constitutional provision is the minimum but not the measure of what may be accomplished by immunity laws. A later case construing the law of 1893 shows that the law may go farther than the constitution requires in granting immunity. Judge Humphrey in the *United States* v. *Armour et al.*, referring to the statute cited above, declared, "The act is a substitute for one of the most cherished rights of the American citizen, the right to remain silent when questioned upon any subject when the answer would incriminate him. It is conceded in argument that the privilege given by this amendment could not be taken from the citizen

[1] Sec. 12 of Interstate Commerce Act as amended March 2, 1889, and Feb. 10, 1891. Compiled Statutes, Vol. 3, p. 3163.

without giving him something equally broad and equally valuable. . . . It might be broader but it could not be narrower. In my judgment the immunity law is broader than the privilege given by the fifth amendment for which the act was intended as a substitute. The privilege of the amendment permits a refusal to answer. The act wipes out the offense about which the witness might have refused to answer. The privilege permits a refusal only as to incriminating evidence. The act gives immunity for evidence of or concerning the matter covered by the indictment and the evidence need not be self-incriminating. The privilege must be personally claimed by the witness at the time. The immunity flows to the witness by action of law and without any claim on his part." [1]

Though the interpretation of the guarantees found in state constitutions need not follow that adopted for similar provisions by the Federal courts, these cases indicate the elements that should be kept in mind in drafting state immunity statutes:

1. The immunity should be as broad as the constitutional guarantee. Otherwise refusal to testify will be based on that defect.

2. The law should make the immunity rest on the truthfulness of the testimony. It should not be allowed to become a cloak for perjury.

3. It should be clear whether the immunity is *limited* by the constitutional privilege. If clemency of a greater degree than is demanded by the constitution is to be granted it should be stated in clear terms.

4. It should be declared whether the immunity is to flow to the witness by the action of the law without any

[1] Argument of the attorney general in *U. S.* v. *Armour et al.* . . . with the opinion and ruling of Judge Humphrey. Washington, Govt. Printing Office 1906; 142 Fed. R. 808.

claim on his part, or that he must assert the claim at the time the incriminating question is put to him.

5. The immunity should be personal only, not including any parties to his act.

6. It should be confined to the witness and not attached to any one else, as might be claimed by the party in whose cause he is testifying. This is a principle to which the courts have with substantial uniformity given their approval. Care should be taken not to allow ambiguous language in the statute to cloud the rule.

III. Unwillingness of Jurors to Convict

Even if the prosecutors are willing to bring the action and if the witnesses are willing to give unshaded testimony, the character of the jury, due to the legal conditions surrounding its selection, may impede the efficient enforcement of the law.

Much more than in the case of reluctance of witnesses to testify, the unwillingness of jurors to see the law enforced may be an effective bar. The state constitutions often seem to be worded in such a way that they favor the accused rather than create conditions which merely guarantee him an impartial tribunal.

In many states the jury must be drawn from the county or district where the offense is alleged to have been committed.[1] In others criminal offenses must be tried by a jury of the vicinage.[2]

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[1] Ala. 1, 6; Ark. 2, 10; Col. 2, 16; Fla. Dec. of Rts. 11; Ill. 2, 9; Ind. 1, 13; Kan. B. of R. 10; La. 9; Minn. 1, 6; Miss. 26; Mo. 2, 22; Mont. 3, 16; Neb. 1, 11; N. H. 1, 17; N. M. 2, 14 (1910); O. 1, 10; Okla. 9, 20; Ore. 1, 11; S. D. 6, 7; Tenn. 1, 9; Utah 1, 12; Wash. 1, 22; W. Va. 3, 14; Wis. 1, 7; Wy. 1, 10.

[2] Ky. 11; Mass. 1, 13; Ind. 1, 20; Me. 1, 6; Pa. 1, 9; Va. 1, 8.

While these guarantees have a sound historical origin, modern conditions have rendered them often a means of preventing local enforcement of laws. The difficulty is illustrated by our experience with liquor legislation. It is often practically impossible to secure convictions when the jury must be locally drawn. Local feeling is so strongly in favor of the offender that the best that can be hoped is for the jury to disagree.

In a few states the power to change the venue is given to the courts,[1] in others it may be regulated by the legislature.[2] In only one is it specifically provided that a change of venue may be taken on the same grounds by either the state or defendant.[3]

Fortunately the constitutions almost without exception do not specifically state that the right to a change of venue is inserted for the benefit of the accused alone.[4] Many of our statutes on the subject still do so. If the law is to insure an impartial tribunal it is much to be desired that the right to move for the change should be granted to the representatives of the state as well as to the alleged offender.

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[1] Del. 1, 9; Md. 4, 8.

[2] Ala. 75 (for defendant); Ark. 2, 10; Col. 5, 37; Ga. 6, 17, 1 (in Superior Courts); Okla. 2, 20; Pa. 3, 23; Tex. 3, 45.

[3] Mont. 3, 16.

[4] It should be borne in mind, however, that the accused has a large advantage in many states because of the rules that the jury shall be of the county or district where the offense occurred. Ala. 1, 6; Ark. 2, 10; Col. 2, 16; Fla. Dec. of Rts. 11; Ill. 2, 9; Ind. 1, 13; Kan. Bill of Rts. 10; La. 9; Minn. 1, 6; Miss. 26; Mo. 2, 22; Mont. 3, 16; Neb. 1, 11; N. H. 1, 17; Ohio 1, 10; Okla. 1, 20; Ore. 1, 11; S. D. 6, 7; Tenn. 1, 9; Utah 1, 12; Wash. 1, 22; W. Va. 3, 14; Wis. 1, 7; Wyo. 1, 10. And in criminal cases by a "jury of the vicinage," in Ky. 11; Mass. 1, 13; Md. 1, 20; Me. 1, 6; Pa. 1, 9; Va. 1, 8.

The offender against the law often enjoys, too, an unequal advantage in the matter of peremptory challenges. It is generally agreed that the number of challenges should be cut down. The adoption of this change in New York proved a decided advantage to those anxious for expeditious and efficient enforcement of the law.[1]

Making the Act one of both Civil and Criminal Liability

An expedient which is occasionally valuable for overcoming the reluctance of witnesses to testify as well as the unwillingness of jurors to convict is to make the same offense subject to both civil and criminal penalties. It is notorious that criminal penalties in corrupt practice acts, perjury laws and statutes involving like conditions are practically unenforceable; yet public and legislative opinion insists that they be retained. From the nature of the acts in question, proof beyond reasonable doubt is usually impossible though proof sufficient to secure a civil decision by preponderance of evidence may be comparatively easy to obtain.

Laws of this nature are not subject to the objection that they punish twice for the same offense. It is admitted that the legislature may make that an offense which before was innocent. It can make that an offense which was already one at common law, in which case the penalties are cumulative; either or both may be enforced. The legislature can create a similar condition. An act may be declared a violation of law punishable by a suit for a fine and may also be made punishable by a criminal action. These cases would stand on the same

[1] The experience of California with a law which allowed the accused twice as many peremptory challenges as the state illustrates the abuses possible. See Journal of Criminal, Law, Jan. 1911, p. 705.

bases as acts, misdemeanors at common law, to which the legislature had added a penalty. It is not punishment twice for the same offense. Together, the civil and criminal sanctions constitute the punishment. That they are enforced in different modes of proceeding and at different times does not affect the principle.[1]

IV. Influence of Term and Election of Judges

Finally, after the conditions of the trial have been shaped as far as possible to ensure efficient enforcement of the law, difficulties may be found in the fact that the judges are subject to political influence and too direct subservience to the local public opinion. Fortunately this is a difficulty of rare occurrence. It is most apt to happen where judges, from the nature of the duties placed upon them, the character of their election, and the term of office, are made subject to the same influences which play upon the elective administrative officers. The independence of the judiciary should not be jeopardized by putting upon them the discharge of such political functions as the granting of liquor licenses. The judgeships should not be made political plums by being put upon the regular party tickets, and the terms of office should not be made so short that the judge will feel it necessary to trim his sails to the local political storm. Where proper safeguards have not been provided it can but be expected that technicalities will be found by which many a case will be upset which ought to stand on its merits, and many a case where convictions are secured will be allowed to pass with the infliction of the minimum penalty.

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[1] Examples of cases dealing with laws of this sort are: *People* v. *Stevens*, Wendell's Repts., Vol. 13, p. 341 (1835); *Moore* v. *State*, 17 Tenn. 353 (1836).

A well elaborated law of this nature is the Wisconsin Corrupt Practices Act, Laws of Wis., 1911, ch. 650.

CHAPTER XVII

THE OATH

Historical Origin

Long before the Christian era the use of oaths to bind solemn promises was a common practice. The oath is a means by which an undertaking is put in an unequivocal form in which the sworn averments can be distinguished from the unsworn, and by it the sanctions of religion give added solemnity and force to the act.[1] The religious element in the oath has varied in importance. Differences of creed have changed the sort of sanction invoked. The phraseology has been widened even to include those who have no formulated beliefs, but some form symbolic of a solemn appeal to the conscience of the one sworn has always been included. The object is to bind the affiant to a greater degree than by an ordinary promise. "It assumes that he recognizes the sacred and solemn nature of his obligation." [2]

An analysis of the original purpose of the oath, and of the form in which in many states it is still administered, shows it to bear to this day the marks of its non-Christian origin. The Deity in pre-Christian religions was not considered as all-seeing. He did not notice the

[1] 3 Coke's Inst. 165, 1 Phil. on Evidence 15, Tyler on Oaths 15, quoted in *O'Reilly* v. *People*, 40 Amer. Rep. 525 (N. Y. 1881).

[2] *O'Reilly* v. *People*, 40 Amer. Rep. 525 (N. Y. 1881). It was a dictum of Lord Coke that only a Christian could take a valid oath, but this doctrine was repudiated in England in the early case, *Ormichund* v. *Barker*, 1 Atkins 19, 21 (1744).

daily lives of human beings, He paid attention only to solemn covenants in which He was called upon to be a witness. Christian nations took over the form, and the oath is still a "calling on God to witness that what is said by the person sworn is true, and invoking the divine vengeance on his head, if what he says is false";[1] it "is a solemn adjuration to God to punish the affiant, if he swears falsely, and its sanction is a belief that the Supreme Being will punish falsehood."[2]

In the original pagan oath the man swearing took a stone in his hand and declared, "If I willingly deceive, whilst he saves the city and the citadel, may Jupiter cast me away from all that is good as I do this stone." The oath was an imprecation calling down divine wrath, if faith was broken. The adoption of the same idea by the church is a signal example of the survival of pagan forms in the Christian religion. The Jewish oath, taken by raising the hand toward Heaven, also had at first an imprecatory character.

The phrase "So help me God," commonly added at the end of the Christian oath, is a survival of the longer formula "So help me God or save me as I speak the truth, or punish me, if I fail in my promise." Some corporal act, too, is often still required or observed by custom, such as laying the hand upon or kissing the New Testament or the Bible. Formerly "and these holy gospels" or "and these holy evangelists" was added to the clause "So help me God."

Logically, the imprecatory oath cannot be justified in a Christian country. It is inconsistent with the idea of an ever-present and all-seeing God to assume that

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[1] *Brock* v. *Milligan*, 10 Ohio 121 (1840).

[2] *Birmingham Ry. Light & Power Co.* v. *Jung*, 49 S. 434 (Ala. 1909).

a special act or formula is necessary to call His attention to an undertaking. If every thought and intent of the heart is already known to the Deity, there can be no excuse for calling upon Him to witness.

It is argued also that the imprecatory oath is not only useless, but blasphemous. The affiant calls down on his own head a curse, renounces all hope from God, prays God that he leave him without His shelter and deliver him over to the powers of evil, if he speak falsely. It is an assumption that the affiant knows better than the Deity what the punishment should be, and that the punishment is within his control. "If you believe in God, it is a blasphemous imprecation; if not, it is a hollow and shameless cheat." [1]

Changes in the Form of the Oath: England

The imprecatory oath was early subject to objection, and even under the later Roman emperors, those who interpreted literally the Scriptural command "swear not at all," were allowed to declare under the form, "This I declare (or promise) as in the presence of God." But throughout the middle ages the usual form included the imprecatory clause. Not until the end of the seventeenth century was other phraseology given legal recognition in England. The growth of religious sects which forbade the use of oaths interfered with the administration of justice, for the courts stood in need of testimony from all classes of citizens. Parliament in 1696 recognized the necessity of modifying the oath by an act intended to meet the conscientious scruples of Quakers. They were to be allowed to take oath in the form, "I, A. B., do declare in the presence of Almighty

[1] Viscount Sherbrooke in *Nineteenth Century*, August, 1882, 12: 318.

God, the witness of the truth of what I say." Still, no Quakers could give evidence in criminal cases, serve on juries, or hold any office or place of profit in the government.[1] The insertion of the name of the Deity still offended them and by Act in 1821 [2] the form was changed to "I, A. B., do solemnly, sincerely and truly declare and affirm." Next, the privilege was widened by being extended to the United Brethren.[3] This statute also allowed taking an affirmation in all cases, even criminal, and in the same year equal privileges were extended to the Separatists. Two years later [4] many oaths were abolished, including those taken in the universities, and in 1854 the Common Law Procedure Act allowed any person who declared he had conscientious scruples against swearing, to affirm. The limitations in the parliamentary oath did not disappear until 1888.

Changes in the Form of the Oath: America

A similar development occurred in America. In April, 1649, a petition of the Maryland Assembly to the Lord Proprietor read, "We do further humbly request your Lordship that hereafter such things as your Lordship may desire of us may be done with as little swearing as conveniently may be, experience teaching us that a great occasion is given to much perjury when swearing becometh common. . . . Oaths little prevail against men of little conscience."[5]

This general objection was later fortified by the scruples of the Quakers, but not till 1702 was the full

[1] Acts 7 and 8 Wm. III, chap. 34.
[2] Act 8 Geo. I, chap. 6, 1.
[3] Act 3 and 4 Wm. IV, chap. 49.
[4] Acts 5 and 6 Wm. IV, chap. 62.
[5] Quoted by B. P. Moore, Amer. Law Rev., Vol. 37, p. 554, 1903.

right of affirmation recognized in Maryland, and the right of the Quakers to testify in capital cases was not granted until the adoption of the Maryland constitution in 1797. A similar development occurred in other colonies in favor of the Quakers and the newer states have always allowed affirmation.

The constitutions tend to disregard the former imprecatory form of oath. Five states are satisfied with general statements that the oath shall be in such form as to bind the conscience.[1] Where forms are given, they often apply only to oaths of office and to the legislature is left the duty of phrasing the general oath. The older constitutions and some recent ones, chiefly in the South and East, still preserve imprecatory forms ending with "So help me God." [2]

In addition to those states in which the provisions are in general directory terms for the guidance of the legislature, almost half of the state constitutions prescribe forms of oath in which no reference is made to God.[3]

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[1] Ind. 8, 1 (1851); Ky. 232 (1891); Md. 39 (1867); Ore. 1, 7 (1857); Wash. 1, 6 (1889).

[2] Ala. 279 (1901); Conn. 10 (1878); Fla. 16 (1885); La. 160 (1898); Me. 9, 1 (1819); Mass. Art. 6, Amend. 1821 (omitted in oaths of Quakers); Miss. 40 (1890); Mont. 19, 1 (1889); Nev. 15, 2 (1864); N. H. Part 2, Art. 83 (omitted in oaths of Quakers); N. C. 6, 1 (1875); N. D. 211 (1889); R. I. 9, 1842 (alternative provided); S. C. 3, 26 (1895); Tex. 16, 1, (1875); Vt. 2, 12 (1793), (omitted in oaths of Quakers); Va. 2, 34 (1902).

[3] Ark. 19, 20 (1874); Cal. 20, 3 (1879); Col. 12, 7 (1876); Del. 14 (1897); Ga. 3, 4, 5 (1877); Idaho 3, 25 (1889); Ind. 15, 4 (1851); Iowa 3, 32 (1857); Kan. 2, 9 (1859); Ky. 228 (1890); Mo. 4, 15, and 14, 6 (1875); Neb. 14, 1 (1875); N. J. 4, 8 (1844); N. Y. 13 (1894); Okla. 15 (1907); Ore. 4, 31, and 7, 21 (1857); S. D. 3, 8 (1889); Tenn. 10 (1870); Utah 4, 10 (1896); Wash. 4 (1889); W. Va. 4 (1872); Wis. 1, 19 (1848); Wyo. 6, 20 (1889); Ohio 15, 7 (1851), and Minn. 4, 29 (1857), require oaths but make no reference to form.

The oaths prescribed by the legislatures are equally varied. Recent statutes, except in the South, tend to drop the formula "So help me God," and to omit all reference to the Deity. A provision of the South Dakota constitution, worthy of adoption by other states, gives the power to the legislature to exempt holders of unimportant state offices from taking oaths.

Some of the more recent state constitutions require that on entering office public servants, besides promising they will support the state and Federal constitutions, shall declare that they have not been guilty of certain corrupt practices at elections.[1] In Oklahoma they must, in addition, declare that they will not "travel upon any free pass." [2] In Kentucky the officer must swear that he has "not fought a duel," [3] and in Nevada that he has not and will not do so.[4]

In only a few states is it specifically stated by the constitution that violation of an oath of office vacates the office.[5] A few make that rule by statute,[6] but most states prefer to rely on impeachment and suit on the officer's bond for the punishment of official misconduct. Suits for perjury do not as a rule lie for violation of oaths of office,[7] and this is true, though the usual form of affirmation ending with "and this you do under the pains and penalties of perjury" would seem to indicate the contrary.

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[1] Del. 14 (1897); Ill. 4, 5 (1870); Mont. 19, 1 (1889); Neb. 14, 1 (1875); N. Y. 13 (1894); Okla. 15 (1907); Pa. 7 (1873); S. D. 3, 8 (1889); Wyo. 6, 20 (1889).

[2] Okla. 15 (1907).

[3] Ky. 228 (1891).

[4] Nev. 15, 2 (1864).

[5] Okla. 15 (1907); Pa. 7 (1873); Wyo. 6 (1889).

[6] See, for example, Birdseye's Cumming and Gilbert's Consolidated Laws of New York, Vol. 3, sec. 1622.

[7] Exceptions are the provisions in Mass., N. H. and Texas.

Statute on oath in the states where the form is not provided by constitution show curious survivals and contradictions. In Kansas a general provision for oaths gives the usual alternative form of affirmation, but the official oath prescribed, though nominally allowing affirmation, keeps the phrase "So help me God." [1] The general tendency is clearly to break down the formalities of wording and omit the corporal acts formerly considered essential to the obligation. The features found in the more recent laws may be summarized as follows:

1. The assimilation in wording of the forms for swearing and affirming by the substitution of "promise" or "declare" for "swear," in the introduction, and the dropping of the imprecatory clauses, is becoming frequent.

2. The elimination of requirements like kissing the gospels,[2] placing the hand upon the gospels, holding up the right hand, is usual. The first of these elements was formerly objected to as idolatrous,[3] now as unsanitary. The latter are no longer required, because they have become meaningless forms which add nothing to the solemnity of the promise.

3. Courts are sometimes given power to require the witness to be sworn in the way which will most bind his conscience,[4] but this provision is of little value with an

[1] Kansas Statutes, 1909, secs. 5467 and 5469. Southern and eastern states insist on the old forms to a greater degree than those of the North and West. This difference, it has been noted above, appears also in the oaths prescribed by the constitutions.

[2] See 2 N. Y. R. S. 407, secs. 82 and 83 amended by ch. 340 of 1899.

[3] It was one of the chief causes of the overthrow of the Andros government in Massachusetts, but it is still a requisite for the oath in some states, chiefly in New England, and is still required in Scotland and France.

[4] See, for example, the section of the New York law, 2 R. S. 407, sec. 85, amended by ch. 416 of 1887, and 340 of 1899: "If the

unwilling witness, for he is usually given the right to object to any declaration more formal than simple affirmation, on the very ground of his "conscientious scruples."

4. Persons not Christians may be sworn according to the peculiar ceremonies of their religion.[1]

5. Oaths of office, where required, are almost uniformly made a condition precedent to entering on the duties of the office.

Most of these rules merely put into statute holdings which had been arrived at in scattered cases by means of judicial decisions.[2] The leader in the United States in modernizing statutes on oaths has been the state of Maryland. By a law of 1898 it abolished the imprecatory clause and forbade the introduction of any other imprecatory words. The laying of the hand upon the bible and kissing the bible were eliminated. All oaths were to be taken with the upraised hand, except in those cases where some other method would more effectually

court or officer before whom a person is offered as a witness is satisfied that any peculiar mode of swearing in lieu of or in addition to laying the hand upon the gospels is in his opinion more solemn and obligatory, the court or officer may in its or his discretion adopt that mode of swearing the witness."

[1] This has long been the case in practice even in states prescribing the form of oath. It was early allowed in England. See *Ormichund* v. *Barker*, 1 Atkins 21 (1739).

[2] Oaths to be administered in any way to bind the conscience. Swearing a person by the uplifted hand is a legal swearing independent of statute. *Gill* v. *Galdwell*, 1 Ill. 53 (1822). Placing hands on bible and kissing it is a permissible form of oath even though statute prescribes another. *Commonwealth* v. *Smith*, 93 Mass. 243 (1865). Holding up hand not essential to the oath. *Dunlap* v. *Clay*, 65 Miss. 454 (1888). A Jew may swear according to his religion. *Newman* v. *Newman*, 7 N. J. Eq. 26 (1847). No particular form essential. *People* v. *O'Reilly*, 61 How. Prac. 3 (1881).

bind the conscience of the affiant.[1] Other states have since followed this good example, and the Federal courts in Maryland adopted the same standard by a rule of January 1, 1902.[2]

The Efficiency of the Oath

Any act too often repeated becomes familiar; if originally sacred or awful, it becomes routine and commonplace. This has been the uniform experience in the use of the oath. Oaths became more frequent in later Rome, but less efficient as their number increased. During the middle ages their common use spread throughout Europe. Priests and ecclesiastics especially encouraged them, for by administering oaths they made large fees. Nowhere were oaths more common and less influential than in England. Oaths of office, of allegiance, military oaths and customhouse oaths — the latter for the importation of small quantities of merchandise, such as a few pounds of tea — grew more and more frequent. In the universities the students were obliged, on entering, to take oaths to obey all the statutes and to uphold the privileges and customs of the college, concerning which they knew nothing when they took the obligation. The result was a lack of solemnity in making declaration. In addition many of the oaths became mere formalities which all recognized but none observed. The oaths in the colleges, for example, bound the affiants to use no language but Latin in conversation in the college — English was spoken every day by instructors and students, — and a certain number of hours each day were to be spent in disquisition — a rule to which no one paid the least attention.

[1] Laws of Maryland, 1898, ch. 75.

[2] For other states in which this standard is now followed, see the practice of New York, New Jersey and California.

One of the influences which has contributed to lessen the efficiency of oaths is the rule allowing interested witnesses to testify in their own behalf. The new rule is undeniably one which promotes justice, but it is generally admitted that it has increased the amount of perjury and has helped make the oath of little consequence.

In the United States no less than in England the solemn formula of the oath has been cheapened and its force destroyed by over-use. It is a striking example of the maxim that familiarity breeds contempt. The power of religion to make the promise binding has almost or wholly disappeared, since ecclesiastics no longer have part in administering the oath and the circumstances of our modern life have made less vivid the pains and penalties of the divine wrath. Attention to the real meaning of the words is no longer given either by him who administers the oath or by him who places himself under the obligation.

Over each state are scattered a large number of notaries authorized "to take oaths" at a nominal charge. Oaths are administered in many states by all officials, no matter what the nature of their duties, and they are demanded of citizens in cases which, by their number alone, must reduce the promise taken to a formality. In a court room the judge is sworn to discharge his official duties; the sheriff, clerk of court, district attorney, witnesses, court stenographers, lawyers on entry into their profession, notaries, justices of the peace, grand jurors and petty jurors are all under oath. The legislators and commonly all the holders of the smaller offices connected with the legislature have taken oaths. The members of the third division of the government, the officers charged with the execution of the law, are similarly bound. State, county, city officers are sworn, so also are bee inspectors, umpires, grain inspectors, gas

inspectors, oil inspectors, veterinary examiners, brand inspectors, road overseers, cadets, assessors, dairy commissioners, directors of penitentiaries, high school trustees, weighmasters of railroads and a host of officers who exercise semi-public functions such as bank directors and trustees. In Kansas, for example, there are one hundred twenty-eight classes of officers who are put under oath.[1]

The manner of the administration of oaths, especially when they are required of other than officials, has helped to destroy their significance. When two or three of a man's near neighbors are competent to swear the affiant and are required by law to do so in a large number of cases, the oath becomes a mere statutory form which is gone through with the same hurry that accompanies the filling out of a bill of lading. The affiant either repeats after the officer phrases the meaning of which he makes no effort to understand, or the officer mumbles through a formula in a way that makes the words unintelligible, the affiant merely responding at the end, "I do." This is all that is left of the former solemn act known as "the taking of an oath."

Oaths Classified by Purpose

Oaths in present practice are taken for three general purposes. By them the one binding himself may:

1. Give a general promise to be faithful to his duty as prescribed by law.

2. Define the duty as he understands it, in specific terms, or repeat a definition of the duty included by law in the oath.

3. Declare that he has qualified himself for the duties of the office or the exercise of the rights which he wishes to enjoy.

[1] Kansas Statutes, 1909.

The first two classes are the so-called "promissory oaths," the last is the "test oath."

For the first sort there is little to be said. It has lost its former virtues and has become a meaningless form. It is valueless as a legislative expedient because the penalties it invokes no longer are looked upon with dread and the manner of its administration destroys what solemnity it formerly had. Public officers are not held to their duties, lawyers are not held to their trusts, and bank directors are not made responsible by their oaths of office, and oaths of allegiance have never proved a bulwark against rebellion. For the violation of the general promissory oath the law as a rule provides no penalty except the distant sanctions of impeachment in the case of those in official positions. Where specific penalties are provided, they could follow quite as well if the person promised without being sworn. The host of oaths of merely promissory character that parade through our constitutions and statute books are phantom soldiers not feared by affiants and inefficient to protect the public.

The promissory oath by which a person states a definition as to his duty in specific terms — or as to some particular subject — has greater merit. It serves to forewarn the affiant. He cannot fail in his duty through actual ignorance of what his promise includes. No disgrace attaches to an official who, through oversight, neglects a detail of his duty under his promise, and if certain things are held essential, the enumeration of the particulars should be inserted. If violation of a promissory oath is to be punished by the penalties of perjury, though a guilty mind be absent, it will be found that enforcement of the law is easier if an express forewarning is provided. In the case of minor officials, especially, it is doubtful whether the penalties of a perjury prose-

cution will be as efficient in securing observance of the law as a system of direct fines for breach of duty. The latter can be established in a way which will allow their imposition in cases which from their triviality would not be taken into court. They can be made available by summary process, by action by superior administrative officers, and they can be more easily graduated to fit the seriousness of the offense. If the constitution require *all* officials to take an oath, it is still possible to make the punishment independent of the oath by referring only to the breach of duty.

The third class of oaths — test oaths — are still a valuable statutory expedient. By them a person declares himself free from certain disqualifications for the exercise of the duty to be undertaken or the right to be enjoyed. They may or may not subject the affiant to penalty for violation and in practice their force is about the same in either case. The deterrent influence is not so much the fear of the penalty in the average case as the reluctance to declare in express terms that which is untrue. The test oath is taken to establish a certain state of facts, not merely to declare the intent of the affiant. Those who have known the law before accepting the office may hesitate to swear to a deliberate untruth, and those who have honestly sought the office in ignorance of their own disqualifications will have these called to their attention before entering the office, thus avoiding embarrassment for themselves and expensive litigation for those whom they have sought to serve.

In contrast to the other forms the test oath remains a useful means of enforcing disqualifications created by statute.[1] Even in such cases, however, the duties

[1] See, for examples of this sort of oath, the constitutional provisions concerning violations of corrupt practices acts, the test

may be read without realizing their meaning; at best the oath stands as a warning to the affiant. It is not an efficient protection to the public.

These forms of oath are not mutually exclusive. For example, the Wisconsin Public Utilities Act of 1905 requires of the members of the railroad commission an oath which has the characteristics of both a promissory and a test oath. It reads:

"Before entering upon the duties of his office each of the said commissioners shall take and subscribe the constitutional oaths of office, and shall, in addition thereto, swear (or affirm) that he is not pecuniarily interested in any railroad in this state or elsewhere, and that he holds no other office of profit nor any position under any political committee or party, which oath or affirmation shall be filed in the office of the secretary of state."[1]

Summary

The oath, once a valuable aid in enforcing laws, has now become one of the weakest of legislative expedients. Its terrors have vanished, its solemnity has been

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oaths required in the various states of voters who "swear their votes in," and the registry applications for voters, such as the following:—

"Each person appearing in response to an application to have name erased shall deliver to the commissioners a written answer which shall be in substance in the words and figures following: I do solemnly swear that I am a citizen of the United States; that I have resided in the state of Illinois since the —— day of —— and in the county of——, said state, since the —— day of ——, and in the —— precinct of the —— ward, in the city of ——, said county and state, since the —— day of ——, and that I am —— years of age; that I am the identical person registered in the said precinct under the name I subscribe hereto.

"The answer shall be signed and sworn to before one of the commissioners."

Revised Statutes of Illinois, 1909, Hurd, p. 1004, sec. 206.

[1] Laws of Wisconsin, 1905, p. 549, ch. 362, sec. 1, subsection *e*.

destroyed. What efficacy it still has except in the case of the "test oath" is attributable to the statutory punishments which its violation entails, and these punishments could follow — and in many cases do follow — the breach of duty, rather than the violation of the oath. The penalties could be exacted as well, even if the individual were unsworn. We have advanced far from the time when it could be said that "no country can subsist a twelvemonth where an oath is not thought binding; for the want of it must necessarily dissolve society." [1]

Oaths no longer bind, or at least bind only in an incidental way — their force is derived not because breaking an oath is dreaded, but because the statutory penalty attached to the oath, and not a real part of it, is feared. In form and in the eyes of affiants, oaths tend to become assimilated with promises, and the penalties which are feared are of this world, not of the next. With every break made in the ancient forms of oaths prophecies have been made that the result would be an increase of lawlessness. The outcome has not justified the belief.[2]

Except for the reason that it has behind it so long a history which seems to justify its continuance, we should probably see the early abandonment of the oath. It might be replaced by a solemn promise intended to call the attention of the affiant to the character of the duty he is about to undertake, rather than invoke against him a peculiarly condign punishment. The punishments for false promises could be retained, but they would attach to the breach of duty rather than the violation of the form through which the duty was undertaken.

[1] *Ormichund* v. *Baker*, 1 Atkins 21 (1739).

[2] In Mexico oaths were abolished over forty years ago with no evil results.

CHAPTER XVIII

BONDS

One of the familiar means to insure the honest carrying out of the duties of an officer under the law is to require him to deposit a bond. By this means a second person assumes to guarantee that the party in whose behalf the bond is issued shall faithfully observe what the law requires of him. Bonds of this sort are commonly required of officers of the federal, state and municipal governments.[1]

A second class of bonds are those required of administrators, guardians, executors and other persons who stand in a peculiar relation to the public, requiring special guarantees that they will not abuse the powers intrusted to them. Of a similar semi-public nature are the guarantees required of certain officers of business organizations such as banks and railroad companies, and corporations in general. Finally, there are bonds required of persons who stand in no peculiar relation to the public except for the duty created by the statute requiring the bond.

Statutes in Which Bonds May be Used

Statutes requiring bonds from public officers, persons exercising special trusts, and from officers of certain

[1] The regulation of the form and character of bonds is almost exclusively statutory. There are directory constitutional provisions on the subject in Ark. 19 (1874); Fla. 16 (1885); Ky. 224 and 238 (1891); Neb. 5 (1875); N. H. 2, 69 (1902); Me. 5, 4 (1819); Miss. 4 (1890); Vt. Amendment Art. 22 (1793); Va. 5 (1902).

sorts of private or semi-public corporations, are familiar. Those of the latter class are as a rule of recent origin. There is no reason why this method of protection cannot be extended, where it is an advantage, to persons in purely private employments, especially when they are to undertake some uniform course of conduct or duty. Recent state legislation shows an increasing use of this expedient. Examples of the way in which the enforcement of law may be facilitated by bonds where the expedient is not ordinarily used are the following: In Massachusetts an act provides that when dogs are known to have worried sheep, fowls or other domestic animals the owner of the offending dog can be required to give bond for $200 that the offense will not occur again within a year. It is provided that if he does not do so the dog shall be killed.[1] A law of 1905 requires that pawnbrokers in addition to their licenses shall give bonds with two sureties in the penal sum of $300, conditioned for faithful performance of the duties and obligations pertaining to their business.[2]

In Indiana a statute provides that parties to a dispute who agree to settle their differences by arbitration may give bonds with the condition to abide by and faithfully perform the award or umpirage.[3] In Tennessee a master of an apprentice is required to give a bond, renewable at the pleasure of the county court, in such sum as the court may direct, conditioned upon the carrying out of the contract the master has made with the court.[4]

[1] Supplement to the Revised Laws of Massachusetts, 1902–8, p. 786–91.

[2] Laws of Massachusetts, 1905, p. 415.

[3] Burns, Annotated Indiana Statutes, Revision of 1908, Vol. I, sec. 877.

[4] Code of Tennessee, 1896, p. 1080, sec. 4329.

The object of all bonds of the kinds mentioned is to protect the public against loss, or to secure the more efficient carrying out of legal duties. The conditions under which the guarantee is given, the penalties, the number and qualifications of the sureties, are prescribed in the law, and the form they take determines the value of the guarantee. Many of the circumstances which surround the giving of bonds have been radically changed in the last generation, and as a consequence new safeguards have now to be observed to insure that they will carry out their purpose.

Character of Bonds

Formerly the sureties on a bond were the relatives or personal or business friends of the person who gave the bond. Their act was one prompted by loyalty, one which pledged their property as a guarantee for the conduct of another person. Through it the public took for itself the benefit of an agreement prompted by the personal confidence of the sureties in the man whose bond they signed, and put itself in a position through which it would profit, though the sureties not only did not, but could not, profit and might suffer serious loss. It was only fair under such conditions, even though the object of the bond was to protect the public, to hold that the liability of the sureties should be only that definitely assumed — it was an obligation *strictissimi juris.*

The development of modern bonding companies has largely destroyed the reason for this rule. When a corporation makes it its business to assume the risk of an officer's defalcation or carelessness, in return for a money payment, there is no longer any reason why the law should not be construed liberally in favor of the public, for the bonding company can not plead that it

undertook the obligation from friendship and without hope of pecuniary return. Statutes are now appearing which recognize the changed conditions and reverse the former standard of interpretation.[1] In many states too, the statutes regulate in detail the conditions upon which bonding companies, especially when chartered in other states, are allowed to do business.[2]

With the development of companies which act as sureties for hire the states have shown a willingness to bear the cost of the bonds themselves. In this way, since the officer no longer bears the charge and is freed from the duty to seek someone who will out of friendship become his bondsman, the chance of irregularities in form of the undertakings or of failure to give bonds, or of the insufficiency of the bonds when given, is reduced to a minimum.[3]

Provisions of Bonds in Favor of Those Protected by the Bonds

The most important feature which should appear in a bond, from the viewpoint of those protected, is that it should always be in full force to cover the acts done. The courts are divided as to whether in the absence of a specific statutory or constitutional statement an office or position in which the holder must give a bond can be

[1] See, for example, Compiled Laws of Oklahoma, (1909,) 1569. "The rule of the common law requiring a strict construction of the obligations of a surety shall have no application to the obligation of a surety . . . for hire but all such obligations shall be liberally construed."

[2] An exhaustive statute of this sort is found in Compiled Laws of Oklahoma, 1909, Art. XXII. See also, Code of the State of Georgia, Vol. I, 1911, ch. 2, art. 4, sec. 18 (p. 665).

[3] For an example of a statute of this sort see Laws of Connecticut, 1899, ch. 112.

taken over *before* the bond is filed and accepted. The giving of the bond may be considered a condition precedent or as an incidental requirement of the position; to be fulfilled within a reasonable time.[1]

Proper protection demands that the law should make impossible any period in which the bond does not bind him who undertakes the duty. Where the bond is required by statute to be given "for the period for which the person is elected or chosen," the courts may hold that *though* given after entry into office it operates from entry into office. It is better to establish that standard by an express declaration.[2] In New York the law is strengthened in the case of officials by making it a misdemeanor for a person to act in an official capacity without filing his bond.[3] Still, even this would not cover cases where misconduct occurred when no bond had been given and no bond was subsequently given. In most offices the practice is still to allow a short period for the filing of the bond.[4] Some statutes make it a condition

[1] Filing bond a condition precedent to holding office: *People ex rel. Finigan*, 85 Cal. 509 (1890). But considered a condition precedent as to a municipal office in *Howell* v. *Commonwealth*, 97 Pa. St. 332 (1881). In general, however, statutes requiring giving of bonds and oaths are held directory unless the statute expressly states the contrary. *Smith* v. *Cronkhite*, 8 Ind. 134 (1856); *U. S.* v. *Le Baron*, 19 How. 73 (1856); *Pickering* v. *Day*, 2 Del. ch. 333 (1866); *State ex rel. Berge*, 46 Neb. 514 (1895).

[2] Cumming and Gilbert's General Laws and Other General Statutes of New York, Vol. II, sec. 12.

[3] New York Penal Code, sec. 42. Cook's Criminal and Penal Code, 1894.

[4] Kerr's Cyclopedic Codes of California I. Political Code, Art. IX, sec. 947. Failure to give bond vacates office. Revised Statutes of Illinois, 1909, chap. 103, sec. 9. Failure to file bond in time prescribed by law creates vacancy. Revised Codes of N. D. 1905, sec. 418. Failure to file bond in stipulated time forfeits the office. Code of the State of Georgia, Vol. 1, 1911, p. 286. Alabama Politi-

precedent to the entry into office, which is indeed the only absolutely safe standard.

A similar difficulty is apt to arise through careless wording as to the period at which the obligation of the sureties ends. Courts disagree as to the time when a bond ceases to bind if it is given "for the period for which the officer is elected." Can the sureties be held responsible for acts occurring after the expiration of the term, but before the successor is qualified, or for acts which officers are allowed to complete if begun within their term even though their successors be in office — as is still the custom in some states for some officers, especially sheriffs? It is therefore wise to include language which will remove any doubt as to the sureties' responsibility for these acts.[1] It would be impractical to require the retiring officer to furnish a new bond for the duties remaining for him to carry out.

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cal Code, 1907, sec. 1498 and 1530. Failure by official to give bond within 60 days after being called upon by Governor to do so gives him power to suspend the officer and appoint a successor to act until another officer is elected or the previous one reinstated. General Statutes of the State of Florida, 1906, sec. 826.

[1] Official bonds bind principals and sureties "for any breach of the condition during the time the officer continues in office or discharges any of the duties thereof." Code of the State of Georgia, Vol. 1, 1911, p. 291.

"Every official undertaking shall be obligatory and in force so long as the officer shall continue to act as such and until his successor shall be appointed and duly qualified and until the conditions of the undertaking shall have been fully performed." Cumming and Gilbert's General Laws and Other General Statutes of New York, Vol. II, sec. 12.

The courts have in some cases held to this standard even without express statutory declaration.

Sureties are held responsible for acts done after end of term of election but before qualification of successor in *Placer Co.* v. *Dickinson*, 45 Cal. 12, 14 (1872).

It may happen that the misconduct may not be discovered during the holding of the position. If the bond comes to an end at a stated time or with the term of office, the release, unless carefully worded, may be a complete discharge from liability. The new bondsmen, if any, cannot properly be held responsible for the misconduct done before the date of their obligation and the old bondsmen should be. The statute should therefore contain an explicit declaration that the bond shall cover all misconduct during its term even though discovered thereafter. These responsibilities should last until destroyed by the statute of limitations.

In order to guard the interests of those protected as far as possible against loss through the depreciation from natural or other causes of the property of the sureties, the statute may well provide that they must be worth, free of all incumbrance, an amount greater than, or a multiple of, that for which the surety signs. A similar object is back of laws requiring sureties to become severally responsible for the full amount of the bond.[1] To prevent defeat of liability by the inclusion in the bond of a sum less than that required by law, the law may declare that if a different sum from that required by law be named the undertaking shall be for the amount so required, or if the law does not name a sum it may be made the rule that an amount named in the bond shall not limit the responsibility of the sureties.[2]

Statutes on bonds should make an express declaration if the form prescribed is mandatory and exclusive. If they prescribe the terms and conditions of bonds and

[1] General Statutes of the State of Florida, 1906, sec. 828. Cumming and Gilbert's General Laws and Other General Statutes of New York, Vol. II, sec. 11.

[2] Cumming and Gilbert's General Laws and Other General Statutes of New York, Vol. II, sec. 11.

declare all bonds in other forms void, they are so; otherwise only the conditions which are contrary to the statute are void and the bond is valid as a common-law bond.

Some authority should be given the duty to review the bond to determine whether the sureties should be accepted under the rules. The statute should make it clear that the acceptance is not a mere ministerial act, but calls for the exercise of the reviewer's judgment in the interest of those to be protected.[1] Where the form of bond has been prescribed, penalties may be provided against an officer who accepts bonds of other forms, resulting in loss.[2]

Especially where the undertakings extend over a number of years it is important that the law should provide a periodical inspection to determine soundness and sufficiency, or that an administrative officer should have power of inspection at discretion, or both. Sureties may become insolvent or may remove from the state when the law requires them to be residents of the state. All danger of loss on this account cannot be removed, but provisions for review will reduce it to a minimum.

Authority may be granted to a superior officer or to a court to increase the amount of the bonds required or to demand new bonds [3] whenever the interest of those to be protected renders it advisable.[4] Another method of insuring that they shall be sufficient is to authorize any of a number of officers,[5] or any person, to demand a hearing on the need of additional guarantees.

[1] See Code of the State of Georgia, Vol. I, 1911, ch. 3, 281.

[2] Alabama, Political Code, 1907, Art. 4, sec. 1485.

[3] Code of the State of Georgia, Vol. 1, 1911, ch. 3, 301.

[4] Code of Tennessee, 1896, p. 1081, sec. 4329. Revised Statutes of Illinois, 1909, ch. 103. Laws of Connecticut, 1899, ch. 112.

[5] Kerr's Cyclopedic Codes of California. I Political Code, Art. IX, sec. 964.

The order in which the various sureties are to be held responsible should clearly appear. The statute should require that it be stated in the bond itself whether it is an original undertaking, or is to replace one formerly given, or is one which is added to the original one, assuming the same legal position as the original, or is to be resorted to only when the remedy on the previous bond is exhausted. In the wording of strengthening bonds special care should be taken to avoid language which may raise the presumption that the obligation on previous bonds is released.[1]

In order to make it easier to ascertain the responsibility of the surety and that the security offered may be within the jurisdiction of the local courts, a few states require that the sureties on the bonds of state and county officers[2] must reside within the state or county, or that they must own property there in an amount sufficient under the law.

The statute should leave no doubt whether the sureties are to be held responsible for acts done under laws passed subsequent to the date of giving the bond. There is no doubt that the sureties *are* bound by all laws previous to the date of the bond even though enacted later than the statute by which the form of the agreement is determined. Many cases go farther, holding that when the duties placed upon the principal by the new law are similar to those formerly exercised, the

[1] See, for provisions of this sort, Alabama Political Code, 1907, Art. 4, sec. 1533, 1534; Kerr's Cyclopedic Codes of California, 1 Political Code, Art. IX, sec. 964–67.

[2] Two states include provisions of this sort in their constitutions. Ark. 19 (1874) and Fla. 16 (1885). Similar provisions are also found in the statutes: Code of the State of Georgia, Vol. I, 1911, 281; General Statutes of the State of Florida, 1906, sec. 829; Alabama, Political Code, 1907, Art. 4, sec. 1488.

sureties are bound.[1] An express statement in the law on this point will avoid possibility of misunderstanding [2] and the legislature may require that the bonds be conditioned for the faithful performance of *all duties that may be imposed by subsequent statutes.*[3]

To make the rights of the parties certain a bond should contain an explicit statement as to whether the sureties are insurers, or merely assume to guarantee that the official will be honest and exercise the care to

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[1] See *McKee* v. *Griffin*, 66 Ala. 211 (1880), and *U. S.* v. *Powell*, 14 Wallace 493, 504.

"Both parties, it must be assumed, knew that changes might be made in that behalf at any time, and the defendants must have understood that it never could have been intended that a new bond should be required with every modification made in relation to the duties and business in which the principals were about to engage."

See also, *Board, etc., of Auburn* v. *Quick*, 99 N. Y. 138.

[2] Bonds cover duties required by laws passed subsequently to the giving of the bond. Revised Codes of North Dakota, 1905, 419. Sureties are held "for the faithful discharge of any duties which may be required of such officer by any law passed subsequently to the execution of such bond although no such condition is expressed therein." Code of the State of Georgia, Vol. I, 1911, 291.

Every official bond binds sureties "for the faithful discharge of all duties which may be required of such officer by any law enacted subsequently to the execution of such bond and such condition must be expressed therein." Kerr's Cyclopedic Codes of California, 1 Political Code, Art. IX, sec. 960. Sustained in *County of Sacramento* v. *Bird*, 31 Cal. 76 (1866). The rule would not apply to new duties of a distinct office created to be held ex-officio by the officer. *People* v. *Edwards*, 9 Cal. 286 (1858). But it does apply when new duties are added to the same office, as where town marshal is made tax collector but a distinct office is not created. *Redwood City* v. *Grimmenstein*, 68 Cal. 512 (1886). Where duties of an entirely different character are placed upon the officer after the giving of the bond it is doubtful, barring a specific statutory provision, whether the sureties can be held for the new duties. See *City of Lafayette* v. *James*, 92 Ind. 240 (1887).

[3] *Morrow* v. *Wood*, 56 Ala. 1 (1876).

be expected of a prudent man. In general, sureties are not responsible when the carrying out of duty is prevented by overruling necessity.

But if an officer execute a penal bond by which he binds himself to perform the duties of his office *without exception*, the better holding is that he becomes an insurer. By this act he adds an express contract to the general duty created by law to be faithful to his trust. In requiring the officer to enter such an agreement the law does not compel him to contract to do an impossibility, though it does make him responsible for losses resulting from no fault of his own, and in some cases caused by forces beyond all human control. The officer does not contract to do the impossible but contracts so to conduct his office that to carry out its duties will not be impossible — which so far as he is concerned is often the same thing.[1] Equivocal language on this point may result in litigation which could be easily avoided if the wording were clear.

Provisions of Bonds in Favor of Sureties

It is an accepted rule that, though a surety signs on condition that some other person or persons also sign the bond, still he will be bound unless the fact that he

[1] Early cases in which sureties are held to the liability of insurers are *Bevans* v. *U. S.*, 13 Wallace 56 (1871), and *U. S.* v. *Watts*, 1 N. M. 553 (1873), in which it was stated that the sureties were not excusable though the principal died defending the public funds. Other decisions holding that lack of fault is no defense are *U. S.* v. *Prescott*, 3 Howard 578 (1844) (where money was stolen), *U. S.* v. *Hamason*, 6 Saw. C. C. 199 (1879) (where money was lost by shipwreck), and *Clay Co.* v. *Simonsen*, 1 Dak. 387 (where funds were lost by fire). The disadvantage arising where it is not clear whether the relation created is that of insurer is shown by the contrast between the decisions in *Boyden* v. *U. S.*, 13 Wallace 17 (1871) and *U. S.* v. *Thomas*, 15 Wallace 337 (1872).

signed conditionally appears on the face of the bond. The statute may therefore well require that a statement be included showing whether the signing were conditional or not. This will remove the possibility of a surety held on conditions into which he did not intend to enter.[1]

Though there is now little chance of misunderstanding, the law may well state the exact character of the penalty. Originally the liability of the sureties on a breach of the condition was absolute and for the entire amount of the stipulated penalty although the damage or loss occasioned might be insignificant.[2] At present this rule has become relaxed so that though the judgment is for the penalty, it is discharged on the payment of the debt and damages as assessed by the jury, plus the cost of the suit. The bond only measures the maximum liability of the surety. In practice, therefore, the penalty of the bond will not now operate as a forfeiture,[3] unless the statute clearly so demands.

Where sureties are individuals who become bondsmen without money payment for assuming the risk, there is every reason for allowing them to retire from their promise where that can be done without damage to the public. The same is true to a lesser extent when the surety is a commercial company. In fact practically the only unusual means of protecting himself which the surety has in exchange for assuming his unusual liability is the power to refuse longer to guarantee the proper

[1] Alabama adopts the opposite standard. It is no defense that a surety signs on condition. Alabama Political Code, 1907, Art. 4, sec. 1505.

[2] 2 Blacks. Com. 341 (Lewis's Blackstone, Vol. I, p. 802).

[3] Violation of the condition was held to work forfeiture inflicted by the sovereign for a breach of its laws in *U. S.* v. *Monthill*, Taney, Dec. C. C. 47.

conduct of the principal. When the privilege of withdrawal is not guaranteed the surety will often find himself in a position where, though he cannot approve the acts of the principal, he is practically powerless to prevent them. It is only fair to allow him to refuse to continue his guarantee of the acts of the principal, when that can be done without loss to those protected. It would not be just to force him to remain in a position concerning the danger of which he had already warned the state.

To remedy this condition, statutes are found which allow sureties to give notice of unwillingness to continue to act, whereupon the principal is called on to furnish a new bond. If this is not proffered within a stated time the office is declared vacant. In this way the responsibility of the sureties is brought to an end and the public is continuously protected whether the man offer a new bond or not. Doubt has been expressed as to the power to declare offices vacant in this way when the term is prescribed by the constitution.[1] In practice many of the statutes on the subject apply in general terms to all offices and the constitutional question appears not to have been raised. Where the office is created by statute, or where the constitution leaves the legislature free to prescribe the end or beginning of the term or to outline other conditions on which the position may be held, there is no doubt that this remedy may be applied.[2]

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[1] Willard, Legislative Handbook, p. 219.

[2] Surety may ask release by giving notice in writing to officer on whose bond he is. Officer must notify the approving authority of request. If a new bond be not given within a specified time the office is declared vacant. Revised Statutes of Illinois, 1909, ch. 103, sec. 10.

An unusual protection is granted to sureties by the statute of Idaho which provides that the party of whom the bond is required may agree with the surety to deposit any assets that may come into his possession in a certain bank approved by the court or one of the judges. The party of whom the bond is required may agree not to draw on this account except with the written consent of the surety, or on an order from the court or one of its judges, made on such notice to the surety as the court or judge may direct.[1]

What Constitutes Delivery

The statute on bonds should contain a clear statement of what shall constitute delivery. Does the bond become binding as soon as it has left the possession of those giving it, or is it delivered only when received by the proper authority? Different rules have been established by statute, and though the courts almost uniformly hold for the first standard stated even in the absence of statute it is best to prescribe that rule in the general statute regulating the form of bonds.[2]

Similar are Alabama, Political Code, 1907, Art. 7, sec. 1540–7, and Kerr's Cyclopedic Codes of California, 1 Political Code, Art. IX, sec. 976.

A less satisfactory plan is that of Georgia by which the surety is allowed to retire on showing cause which the governor thinks sufficient. If new bond is required by governor it must be given within ten days or the office is vacated. Code of the State of Georgia, Vol. I, 1911, 301 and 302.

[1] Idaho Revised Codes 1, p. 1171, sec. 2947.

[2] Under Acts of Congress the bond of a deputy postmaster is held not delivered until it has reached the hand of the postmaster-general and been approved by him. *U. S.* v. *LeBaron*, 19 Howard 73 (1856), but a different rule is enforced as to bonds of collectors of customs. *Broome* v. *U. S.*, 15 Howard 143 (1859).

CHAPTER XIX

LICENSES AND INSPECTION

The motives back of the issuance of licenses may vary from the establishment of a standard of quality for the protection of the public down to the production of revenue only. The former is in theory always their excuse, but in practice they are often only taxing measures using a peculiar method of collection. With the merits of the license as a revenue producer we have no concern. It is to be judged, then, from the economic standpoint. It is considered here as a tool of legal control. For our purpose the license is merely a means by which conditions which might prove dangerous to the public can be measured and a corrective applied in advance. By the use of the license a standard of goods or service may be established by law, the observance of which it might otherwise be impossible to enforce. There are several classes of cases to which this means of law enforcement is peculiarly adaptable.

Business Licenses

Most important are the licenses on businesses which from their nature involve possibilities of unnecessary danger to the public. The chief instance of regulation in this class involves the perennial problem of the regulation of the sale of liquor. Some of the chief means of control which have been used where the policy of licensing has been followed are:

(*a*) Granting licenses for one year only, so that the licensing authorities will have the question of compliance or non-compliance with the law frequently brought before them for review.

(*b*) Limiting the maximum number of licenses by the population of the city, ward or other civil division, as one to 1,000 population.[1]

(*c*) Prohibiting granting of licenses within certain distances of public parks, churches or schoolhouses.

(*d*) Requiring any person holding a license to sell liquor to be drunk on the premises to hold also a license as innholder or victualer. A provision of this sort used in Massachusetts and in Pennsylvania gave general satisfaction. It was argued that it helped eliminate disorderly bars. In New York, under the famous Raines law, the licenses issued produced an exactly opposite effect. The hotels operating under such licenses often became disorderly houses.

(*e*) Making courts the licensing authority. This was done on the theory that the long term of the judges would make them independent of the political influence of the liquor interests. It was doubtless true that this would be a better plan than the alternative of putting license-granting into the hands of the mayor or aldermen of cities; but it did not destroy the political influence of liquor and it put an unwelcome burden on the courts. Especially in large cities licenses are very valuable and when large numbers are to be issued it is not to be expected that the courts in their actions as to them will be as free from suspicion of accepting bribes as in their

[1] In Boston it was found that an expedient of this sort was of value in reducing the "number of saloons and making the keepers more law abiding, but the evidence does not justify the statement that it would work well everywhere." *Winez & Koren*, Liquor Problem, p. 8. Houghton, 1897.

ordinary judicial duties. It is more important to protect the judge in his reputation for honesty than to insure fair licensing.

(*f*) Creating special commissions for licensing. These provisions have been of varying value. In some cities, especially when their members retire at different times and are appointed for long terms, they have been a decided success. Elsewhere they have, because of these very characteristics, forced the liquor interests to take an active part in politics all the time to insure that the commissioners shall not be "unfriendly." In the average case every licensing board becomes a powerful factor in local politics.

The Ohio constitution of 1851 forbade licenses and forced the state to the plan by which, under the law now in force, a flat charge of one thousand dollars per annum is demanded from anyone wishing to take up the business of the sale of liquor. Since it removes the discretionary element it has been claimed that this plan removes the liquor influence from politics to a greater extent than under the usual license scheme.[1]

(*g*) Giving to the licensing authority the power to revoke the license at any time when judged necessary to protect the public interests.

(*h*) Providing that licenses shall be forfeited for infraction of law.[2]

(*i*) Providing that no new license should be issued to a person for a term of years after forfeiture of a previous license.

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[1] When the question of changing from the Ohio plan to the licensing system was before the Ohio Constitutional Convention in 1912 it was vigorously opposed by the Anti-Saloon League. Campaign Text-Book Against License, Ohio Anti-Saloon League, W. B. Wheeler, 1912.

[2] A good example of a comprehensive provision of this sort is Laws of Wisconsin 1905, ch. 489.

(*j*) Making special regulations for the bonds of licensees. Abuses arise when wholesale dealers get control of retailers by signing bonds for them. Legislation has been passed to prevent this by forbidding any person to sign more than one bond (Iowa) or requiring that bondsmen shall not be engaged in the manufacture of spirituous or malt liquors (Pennsylvania). Office-holders might well be forbidden to be on bonds.

(*k*) Requiring consent of the owner of the building where liquor is to be sold before license will issue or the consent of all owners within a certain number of feet of the saloon.

(*l*) Placing restrictions on the way in which the business can be carried on, as by forbidding that musical instruments may be played on the premises, or providing that saloons shall not be run in connection with dance halls, bowling alleys, concert halls, theatres, boxing or wrestling exhibitions.

(*m*) Forbidding objectionable pictures, or the use of dice, cards, screens or partitions.

(*n*) Forbidding the employment of women as bartenders, waitresses or singers.

(*o*) Prohibiting druggists to sell liquors except on a physician's prescription.

(*p*) Creating a special state constabulary for the enforcement of the rules to be observed by the licensees.

The regulation of various callings alleged to be in a peculiar relation to the public began in England at least as early as 1547.[1] Almost from the first the device has been used in ways which show that the protection of the public was only the secondary object. Besides the regulation of the liquor traffic, where the public interest was clear, licenses were frequently demanded for many

[1] 5 and 6 Edward VI, ch. 21 (1547).

sorts of livelihoods, alleged to involve danger. Steeplejacks, chimney sweeps, and the like were early required to have licenses. Present-day legislation, under the same excuse, tends to increase the number of cases regulated. The requirement of licenses to practice as a physician or dentist or pharmacist, or to run engines,[1] is evidently justifiable on the ground of the protection of the public, no matter how great may be the incidental advantage reaped by those licensed through the exclusion of unqualified competitors. Licensing of hackmen and ferrymen and the regulation of their charges is also justified because of public policy. But much of the licensing authorized by our present legislation is evidently motived not by protection of the public nor even by the desire for public revenue, but by the supposed benefits coming to those licensed by the creation of their veiled monopoly. The licensing of barbers, horseshoers, and similar tradesmen involving examinations for entry is now becoming frequent.[2] Regulations of this

[1] For recent examples of this sort of legislation see Laws of Alabama '07, p. 591 (physicians); Laws of Pa. '07, ch. 127; Laws of Kas. '07, ch. 196; Laws of Minn. '07, ch. 117 (dentistry); Laws of Me. '07, ch. 82 (engines).

Doubtless licenses of this sort may in some cases be based in fact as well as in theory on the police power. But the large number of cases in which the licensing boards are given control through examination over entrance into the trade, the fact that the fees are not turned into the public treasury but form a fund for the expenses of the licensing board, and the fact that the state treasury is not liable for the costs of suit under the acts, indicate that in many cases public protection is the excuse and not the reason for the law.

[2] Examples of the recent rapid extension of licensing are found in the following laws: Licensing of distributors of advertisements, N. J. '08, ch. 27; of architects, the expenses of the board of licensers *including those for prosecution for violations of the act* to be paid from fees, N. J. '08, ch. 128; of cotton classifiers, La. '08, ch. 212; of cotton weighers, Miss. '08, ch. 312; of cotton seed dealers, S. C. '08, ch.

character not infrequently have been used as a means by which the number of apprenticeships and the number of those in the "profession" can be regulated to the advantage of those already licensed.

Construction Licenses

Especially on account of the growth of our cities and improved means of transportation, the necessity of licensing buildings, bridges and the means of transport has increased. The interest of the public demands that a standard of safety beyond what the owners might consider necessary should be observed.

Building licenses are required, partly at least, because of the danger which the public endures during the actual work of construction and the permanent menace to public safety of unsafe constructions, whether the building is used by the public or is only a danger because of its proximity to the public highway, its liability to fire or its unsanitary arrangements. Inspection and license may be required before the building is started, during the process of construction and afterward. It may include the plans of the construction, to ascertain before work is started the intent to comply with the building laws, the solidity of the foundations, the character and soundness of the building materials, the conformity of the

518; of bird collectors, La. '06, ch. 198; of oystermen, La. '06, ch. 178; of taxidermists, Mont. '07, ch. 162; of barbers, N. Y. '06, ch. 256; Conn. '07, ch. 76; Mo. '07, p. 79; of dentists, Va. '06, ch. 154; of pharmacists, Ky. '06, ch. 140; of gypsy bands, Fla. '07, ch. 115; of horseshoers, N. Y. '07, ch. 83; of dealers in evergreen trees, Vt. '06, ch. 139. Of longer standing and of varying frequency are the licensing laws relating to accountants, commission merchants, dogs, stallions, osteopaths, pedlers, plumbers, steamboat engineers, fortune-tellers, hotels, electricians and numerous other classes of things and persons.

actual construction with the building plans, the observance of the legal requirements as to width of halls, ventilation, and fire escapes, the maintenance after completion of the structure of the standards required by law, in fact any feature in which the public has a proper interest.[1]

Factory Licenses

Licensing is a means available also to secure the observance of standards of safety in the mechanical and other trades. It may be made a rule that a factory can operate only on getting a license showing that it has complied with special requirements for the safety and convenience of its employees. It may be required that a license must be secured from the state authorities before particular machines can be used by the operatives, or the law may provide that the machines themselves may be licensed as a means of enforcing the adoption of safeguards for the employees. Similarly, steam machinery may be subjected to a periodical inspection to determine safety, or the inspection can be started at any time by complaint.[2]

The license as a means of law enforcement is popular and is evidently destined to a wider use to protect the public, as well as for revenue.

Licenses in Legal Situations

Damage may be done to the interests of large numbers of individuals if the first steps in various legal processes are not properly carried out. To insure observance of

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[1] Recent laws relating to this power: Ark.' 07, ch. 352; N. J. '08, ch. 64; Ohio, '08, p. 124 and 232; Mass. '07, ch. 550; N. D. '07, ch. 135; S. D. '07, ch. 165.

[2] See the laws for boiler inspection, Mass., '07, ch. 465.

these requirements the law may demand that at some point early in the organization licenses be secured which will not issue unless the law has been complied with or it is proven that the preliminaries necessary to be gone through are about to be accomplished.

A framework of legal rights may be compared to a building. In each case the interests of the public may demand that the foundation be secure and that periodical inspection be made. It would be as much against public policy to allow rights to develop which rested on unstable or uncertain foundations as to allow irresponsible persons to engage in dangerous professions, ignorant persons to build unsafe houses or bridges, or unskilled persons to compound drugs or practice medicine. It may therefore well be decided that when such circumstances are apt to arise it will not be enough to lay down in the statute the steps to be followed but that there shall be an inspection to determine officially whether the preliminary requirements have been fulfilled.

In some states the formation of private corporations is now surrounded by these safeguards. An excellent example of the tendency to extend public supervision over these artificial persons by reports, inspection and licensing is found in the statutes of Massachusetts.[1] The chief elements involved in the supervision may be summarized as follows:

1. On the organization of any new corporation, after the first meeting the record thereof with the articles of organization must be submitted to the commissioner of corporations who shall examine them and may require amendment of the articles or additional information to

[1] Revised Laws of Mass. 1902, Vol. 2, ch. 109 and 110, and Supplement to the Revised Laws of Mass. 1902–8, pp. 874 *et seq.*

insure that the legal requirements are met. If he finds that the articles conform to the provisions of law he certifies to that effect and only thereafter upon the payment of the proper fee are the articles filed in the office of the secretary of the commonwealth, who issues and indorses a certificate of incorporation.

2. Yearly thereafter reports are rendered which are subject to the inspection and approval of the commissioner of corporations.

3. The issues of stocks are made under state supervision. In certain cases the amounts which can be issued are under direct state control.

4. Business corporations must file with the commissioner of corporations certificates as to any change in their by-laws.

5. Any articles of amendment must be submitted to the commissioner of corporations, who examines them in the same manner as the original articles of organization, and no amendment of the articles of incorporation takes effect until filed in the office of the secretary of the commonwealth as in the case of the original articles.

The movement for the regulation of insurance companies has recently made licensing of this sort familiar in many states. In some cases the supervision includes inspection and licensing at a number of steps. For example, in Wisconsin all companies are periodically subject to inspection,[1] certain insurance agents are licensed [2] and the companies are licensed [3] with special provisions for domestic and foreign companies [4] and

[1] Laws of Wisconsin, 1911, ch. 648.

[2] Laws of Wisconsin, 1911, ch. 27.

[3] Laws of Wisconsin, 1909, ch. 39; '07, ch. 640; '07, ch. 132; '07, ch. 150.

[4] Laws of Wisconsin, 1909, ch. 39; '07, ch. 640.

for companies in the various branches of the insurance business.[1]

The field in which the expedient of registration, certification or licensing may well be used is as yet only slightly developed. Checks of this sort might be found valuable in guarding municipal divisions against the issuance of bonds beyond their powers [2] and in making a preliminary investigation of the right of various drainage boards, park commissions and the like, to levy proposed taxes. Periodic inspection could also be provided if thought advisable, as is already the rule in some states in the case of various classes of strictly private corporations. Expedients of this nature would not be conclusive proof of the conditions found, nor warrant the legality of the steps approved, but would help to avoid errors due to ignorance or want of familiarity with what is meant by the terms of the law.

Other Protective Expedients

A number of classes of laws may be discussed with licenses because, though not involving the issue of any formal document, they do provide for inspection or regulation, or give the public advance information or warning as to the character of the goods or service. Other laws furnish warnings of danger which, while not preventing the evil, lessen it, or furnish means for partially counteracting its effect.

[1] Laws of Wisconsin, 1907, ch. 511.

[2] In Kansas the attorney general passes on the question of whether "bonds are regularly and legally issued" (and) . . . "are a valid and binding obligation against the county school district or other municipality issuing the same and that said county school district or municipality has not issued bonds in excess of the limit fixed by law," etc. Laws of Kansas, 1905, ch. 471, sec. 6.

1. Pure food legislation amounts to a predetermination or standardization of the product offered for sale. The inspection provided or the guarantee of purity required is a means of determining quality which takes the place of later investigation. In fact, it would be difficult or impossible to secure any adequate sort of inspection after the goods had passed out of the control of the manufacturer.

2. Warnings against using certain services except in certain ways may be required to be posted. Though they do not prevent the evil completely nor establish an unfailing enforcement of the legal standard, they lessen the temptation to infringe upon it and thus protect the public. Laws of this sort are those which require posting of notices stating the capacity of elevators, the speed at which teams are to be driven over bridges, the load that can be carried over bridges and the number of carriages to be allowed thereon at a single time. Of course the fines collectible for violation of the rule aid in enforcing the law, but the chief value of such rules is that they acquaint those who are to obey them with what is a *safe standard for them.*

3. Somewhat similar are the laws which require that movable planks shall be placed on all bridges, which must be used when traction engines or other heavy loads are taken over. Warnings that bridges or other constructions are unsafe serve a similar purpose, as do also the laws requiring poisons to be conspicuously labelled,[1] or special warnings to be given of their deleterious effect,[2] or requiring the presence of harmful drugs [3] in medicines to be declared, and that receptacles containing

[1] Gen. Stat. Kan. 1909, sec. 2763.

[2] Special warning as to effect of wood alcohol, Mont. '07, ch. 156.

[3] Patent medicine containing opium, chloral, alcohol, acetanilide or antipyrine to be branded. Utah '07, ch. 149.

inflammable or explosive substances shall be painted a certain color [1] or conspicuously marked.

4. Aid after the damage has occurred can be made easy to obtain in some cases by providing that a remedy must be kept close at hand. An expedient of this sort is found in the laws requiring retailers of poisons to pack with them antidotes to overcome their misuse, or to publish on the label of the poison its antidote.[2]

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[1] Gasoline to be kept in red receptacles. Kan. '07, ch. 191. Dynamite to be marked. N. M. '07, ch. 106.

[2] Wood alcohol to have antidote on the label. Laws of Mont. '07, ch. 150.

CHAPTER XX

MINOR LEGISLATIVE EXPEDIENTS

Besides the main legislative expedients already described, there are an indefinite number of more limited application which are occasionally available to carry out legislative policy. The more important of these exceptional expedients are discussed in this chapter.

Suspended Sentence

A large number of cases involve conditions in which the infliction of a penalty either will not be a hardship to the one against whom it is placed or will involve increased hardship upon the innocent to guarantee whose rights the law may have been drawn. To meet such cases the device of the suspended sentence is being increasingly used. This is, in fact, only a modification of the penalty, but the markedly different effect which it has upon the offender justifies treating it as a separate expedient. So far as the guilty person is concerned, it is viewed as a reward for future observance of the law, rather than as a penalty for past wrongdoing. The artificial creation of this condition will often be a greater impulse to law observance than could be hoped for from the reformatory influence of an actual jail sentence.

For many of the common lesser offenses a jail sentence, except for one convicted for the first time, ceases to have terrors. What the course of the law will be is familiar. The records of recidivism are eloquent of the fact that in large classes of cases the usual penalty too

often fails of its theoretical result and makes wrongdoing a habit or a profession. The suspended sentence takes account of the fact that a man's greatest dread of the penalties of the law is present before they have been actually fastened upon him. Rational methods of punishment should therefore use every means possible to utilize this deterrent influence. It may be better not to rely wholly upon the ordinary fear of punishment, but to provide that even after the act has been done its consequences may be escaped, by a special grant of clemency on the part of society, if, for the future, the law is obeyed.

This means is one of the most effective ways of keeping the offender a stranger to the actual penalties of the law. That which is unknown is dreaded and feared. An unexperienced penalty has around it a mystery and uncertainty. The penalties of new laws, such as those inflicting flogging, especially flogging in public, are terrible even to those who have become accustomed to the usual punishments. In this qualified sense the old argument against publishing the laws — that it was an advantage to keep them unknown so that the people might act only as conscience dictated — expressed a truth. To break down the mystery that surrounds the punishment is, to a large extent, to destroy its deterrent effect. Whether the penalty shall be inflicted at once or hung like the sword of Damocles over the head of the offender, can be made determinable in view of the facts in the individual case, so that the wrongdoer cannot think the law a guaranty of the privilege of doing the wrong act *once*. He may be required to report at intervals as prima facie evidence that he is carrying out the terms of his exceptional agreement with the court.

The actual administration of suspended sentences still leaves much to be desired but the principle that lies

back of them is now firmly established. With some exceptions we have made no adequate provisions for the proper number of qualified probation officers, and the work of those provided has been left almost without direction. Probation work can not aid, as it should, in encouraging the observance of law until each offender is kept under effective supervision which will insure that if he does not live up to his agreement the original sentence will be imposed. Where, as formerly in New York City, probation work is left entirely to volunteers provided by private organizations, it is evident that suspended sentences may become an abuse — a veiled immunity from the consequences of the first offense.[1]

Properly administered, the suspended sentence will work for law observance by putting upon the first offender, especially, an acute fear of the penalties of the law. It calls to his mind, as never was the case before he committed the act, the disgrace attendant on jail sentence. It allows him to remain out of jail, but it holds constantly before his mind the now very patent fact that he will be better off if he obeys the law. In this way it subjects him to the reformatory influences of the sentence, but it saves him from the destructive associations that pervade the best of jails.

The class of cases to which the suspended sentence may properly be applied is indefinite. There can be little objection on principle to its application when the wrong is *malum prohibitum* but not *malum in se*. In some cases its use may be extended even to acts of the latter class. Whether public policy will allow any modification of the standard penalty must be decided on the basis of the individual case.

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[1] See discussion in Annals of the Amer. Acad., July, 1910, The Treatment of the Offender, Homer Folks, 36, 1.

Often the use of the suspended sentence will be beneficent, when to exact the usual penalty would bring hardship to others rather than to the offender. Punishment for desertion, non-support, habitual drunkenness and wrongs of a similar sort may well be righted by granting the defendant an opportunity to reform under suspended sentence. In such cases the evil created by the wrongful act is destroyed and the wrongdoer is brought back into the ranks of useful citizens. The alternative of putting the man in prison and his family in the poorhouse is a poor substitute, even if the additional cost to the public be not considered.

Subsidy

One of the most valuable of statutory expedients for encouraging local development has been found to be the granting of state aid to the local civil unit. Where the advantage extends to the state as a whole, and is one which is generally claimed, this expedient approaches a process of putting money in one pocket and spending an equal amount from another. The *result*, however, is a general advance to a higher state of development for the localities. The lever of a public subsidy has crowded them on to a standard they would not so soon have arrived at by themselves. Local rivalries are played off against each other. Each locality wishes to get the extra money which the state will give if a little more is locally expended, and each is jealous of any advantage of the sort which may already be enjoyed by its neighbor.

Especially in the building up of our educational systems has this method of encouraging local expenditure been successful. The localities can be encouraged to increase the length of the school term by the grant by the state of additional support from the state treasury if the school is kept open for a period greater than the minimum

required. Special state grants may be arranged if the local schools are united into township schools, if transportation facilities for the pupils are furnished, and if manual training, domestic science, industrial work or any other branch which it is especially desired to promote be put into the curriculum.

Care should be taken that the basis upon which the subsidy is granted be so adjusted that the greatest stimulus possible is given to the policy to be promoted. For example, the grant of school funds should be made to the different divisions not on the basis of population but on the population of school age, or better yet, on the basis of the enrollment, or the actual average school attendance during the previous school year.

Similar subsidy schemes have been used in a variety of circumstances, as for the encouragement of bridge building, road building,[1] and promotion of farmers' institutes; but the possibilities of using this expedient to encourage local expenditures for public purposes, while retaining an efficient means of control in the hands of the central administrative authorities, have as yet hardly been appreciated.

Bounties

Of similar operation are the bounty laws, which still play a large part in facilitating the destruction of noxious[2] animals and insects. Laws of this nature now promise

[1] See N. Y. State Library Review of Legislation, 1908, p. 415, *et seq.*

[2] See recent examples, Laws of R. I., '08, ch. 1586, foxes; Laws of Ariz., '07, ch. 49, various animals; Laws of Conn., '07, ch. 116, raccoons; Laws of Idaho, '07, p. 24, crickets, grasshoppers, rodents and rabbits; Laws of Illinois, '07, p. 9, groundhogs; Laws of Pennsylvania, '07, ch. 53, various animals; Laws of Wisconsin, '07, ch. 364, English sparrows and rattlesnakes.

to find an increased use to encourage the development of industries within the various states. The planting of trees,[1] the sugar beet industry,[2] the building of public utilities — in the form of stock subscriptions,[3] and a variety of other businesses have been stimulated by this means. In this class may be placed the set-offs in taxes allowed those who maintain public watering troughs for horses and cattle.

Tax Exemptions

For a similar purpose exemptions from general or local taxation are found. Examples are the authority granted municipalities to exempt from municipal taxation, for a period after their founding or indefinitely, factories or public utilities,[4] or rock and stone plants.[5] Other laws free from taxation land set apart for production of forest trees,[6] sugar beet factories,[7] lime nitrogen plants,[8] hydro-electric plants,[9] dams,[10] and a large number of cases similar, in that their object is the general development of the localities in which the favors are granted.

Creation of Legal Discriminations

A variety of circumstances allows the creation of conditions by which a certain course of action is made

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[1] Laws of North Dakota, '07, ch. 41.

[2] See Laws of New York, '05, ch. 759, establishing beet sugar bounty.

[3] Laws of Neb., '07, ch. 17. Examples of this sort could be multiplied at will.

[4] Laws of Oklahoma, '08, ch. 10, Art. 3.

[5] Amendment to Const. of Miss., '08, ch. 197.

[6] Laws of Maine, '07, ch. 169; Laws of Wis., '07, ch. 592.

[7] Laws of Iowa, '07, ch. 55.

[8] Laws of Alabama, '07, p. 519.

[9] Laws of Ala., '07, p. 520.

[10] Laws of Arizona, '07, ch. 92.

difficult or is rewarded with special privileges. Though the number of instances in which expedients of this sort can be used is restricted, still, as a means of establishing a uniform legal standard, or as a means of inducing action which could not be directly forced, they are often of the highest importance.

Uniformity of standards and a new basis of legal control by the state is the object back of the provisions, both statutory and constitutional, which give certain rights only to those corporations which come under the general law by submitting to amendment of their former special charters. Provisions of this sort are found in most of the later constitutions. The phrasing of the rule is various. It is declared that except the corporation hold its charter subject to the provisions of the constitution no general or special law,[1] or renewal or extension,[2] or remission of forfeiture,[3] or alteration or amendment,[4] shall give it any increase of rights. The acceptance of any single amendment is sometimes specifically declared to be enough to subject the corporation to the general law.

Statutes adopt the same standard even where not required to do so by the constitution, and thus extend favors to those corporations which have surrendered the right to hold their charters as unamendable contracts,

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[1] Ala. 231 (1901); Ark. 17, 8 (1874); Ga. 4, 2, 3 (1877); Idaho 11, 7 (1889); Ky. 190 (1890); La. 262 (1898); Md. 48 (1890); Miss. 179 (1890); N. D. 133 (1889); Okla. 9, 11 (1907); Pa. 16, 2 (1873); S. C. 9, 17 (1895); S. D. 17, 3 (1889); Utah 12, 2 (1895); and especially to railroads, Ala. 246 (1901); Col. 15, 7 (1876); Mo. 12, 21 (1875); Mont. 15, 8 (1889); Tex. 10, 8 (1876); Wyo. 10, 6 (1889); and to express and transportation companies, Mont., Wyo.; and telegraphs, Wyo.

[2] Del. 9, 2 (1897); La. 22, 62 (1898); Mich. 15, 8 (1850); Va. 158 (1902).

[3] Ala., La., Md., Miss., N. D., S. C., S. D.

[4] Ala., Del., La., Miss., N. D., S. C., S. D., Va.

while those which have not done so continue in the enjoyment of their old rights, but are excluded from the advantages of the later legislation.

Of more recent development are the laws which create discriminations by repealing certain portions of the common law, thus to induce indirectly the acceptance of standards which it would be impossible to establish directly. Examples of this expedient are found in the Ohio and Wisconsin Employers' Liability Acts. In order to avoid any question of constitutional rights, such as freedom of contract, the law is made optional in form — the employers being given the nominal choice of coming under the act or remaining free from its operation. But the latter alternative is made unacceptable by repealing the common law defenses of assumption of risk, contributory negligence and the fellow-servant doctrine. No man has a constitutional right to the continuance of the rules of the common law, but their continuance would be the chief reason in this case for an insistence by the employer on the constitutional right of free contract. The choice is still nominally left him to accept or reject the new law, but if he rejects it he must rely on legal conditions much less favorable than he has heretofore known.[1]

Like the subsidy, both these means are in reality only special inducements to crowd forward those to whom the laws apply into a new set of legal conditions where the public rights can be better protected.

Publicity

(1) Of the Law

When the law is published only through the ordinary official channels, it does not impress itself on the minds

[1] See Laws of Wisconsin, 1911, ch. 50.

of those to whom it gives rights, and upon whom it places liabilities. Its observance is fostered by the requirement that sections affecting particular classes of people shall be posted in places where they will be sure to be called to their attention.

It may be required that laws as to child labor shall be posted in all factories, or that the provisions of employers' liability acts be similarly made known. Railroad rates and fares, charges on public utilities, the temperature required to be kept on cars, the duty to maintain fire escapes, the closing hours for saloons, dance halls and theatres, may be brought home to those affected by requiring the conspicuous posting of the law.

Of this sort are the laws occasionally met with which require not only that goods sold shall be stamped with the net weight, but that there shall be attached a statement of the penalty the law provides in case of violation. Of this sort, for example, are the tickets required to be delivered with coal on which the penalties for short weight are set forth.

(2) **Of the Offense**

Occasionally the observance of the law can be promoted by holding its violation up to public scorn. If the wrongdoer becomes liable to a fine only, he may pay it often without compromising greatly his standing in the community. Even the chance of imprisonment may not drive him to observe what the law demands, because he counts on the possibility of an acquittal, and if not that, he hopes that the result of his wrongdoing may not be noised abroad. The fear of general advertisement of the offense he has committed may have as great a psychological effect as the fear of ordinary punishment. It may be a punishment which so overshadows the other that other penalties may be omitted. The fact

that under certain circumstances it is one easy to inflict may make the expedient available.

But publicity of the offense does not, in the average case, appeal to popular favor in America. In the New England colonies common scolds were required to wear placards with the letter "S." A similar punishment is the basis of Hawthorne's "Scarlet Letter". The stocks and the pillory, and the recent laws in Delaware providing for the public whipping of wife beaters, all appealed to the publicity of the offense and punishment, as a means of deterring violation of the law. But American sentiment, especially with the emphasis which is given to the reformatory factor in punishment, has revolted against public advertisement of wrongdoing. In some of the continental countries the expedient has been revived for minor political delinquencies, like failure to exercise the elective franchise — the names of those neglecting to vote being posted up to the public gaze. But it is not a means of enforcement that can be generally used.

(3) **Of Conditions of Work**

In some laws partial reliance is placed on publicity of the acts done, or the conditions under which work is being done. Of this sort are some of the statutes requiring reports from corporations, laws for bank inspection, laws for reporting of accidents on railroads or in factories, laws requiring a periodical statement of public funds, and the laws requiring "lobbyists" to be registered, and those forbidding the use of partitions, ground glass windows and screens in saloons.

Change of Conventional Sequence

In the so-called laws of nature, and of morals, the consequences which follow certain acts are automatic. If a blow falls on a muscle, pain results; if a rule of moral

conduct is violated, the wrongdoer cannot escape the penalties of a guilty mind and, if the act becomes public, the disapprobation of his fellows. But in law, properly so called, there is no similar case. The *malum prohibitum* of today may tomorrow be made a blameless action, or the punishment may be lessened or increased, or changed in kind. This flexibility, brought about through control of the legal result of an action, as compared with the moral consequence or what is commonly known as the "natural" consequence, puts into the hand of the lawmaker an instrument which can be used to promote the observance of standards of action, through control of the conventional sequence which shall follow specific acts done.

Instead of forbidding the doing of an act which normally would have a certain legal consequence, it may be easier to induce its avoidance by changing for that case the legal result. That is, instead of forbidding the act, the legislature may prohibit the result — a thing obviously impossible in the case of physical sequences. Or, if the act involves elements which would normally fall short of a legal consequence which it is wished to promote, the law may declare that though the first steps were insufficient, still the legal result shall be the same as if they were properly taken.

A familiar example of interruption of the legal sequence of acts are the rules by which debts, arising from betting and gambling contracts, are made uncollectible. The state of being bound which would ordinarily follow the agreement does not occur. The act of betting, for example, may be allowed, but the creation of legally enforceable rights thereby may be avoided. Over the one thing the law never could be given an effective control, over the other it has real power. Or even if payments *are* made, they may be held legally unconnected

with the former contract, so that the amounts paid may be recovered as if turned over or loaned to the person to whom paid.[1]

The converse case, where the preliminary steps are insufficient to establish the result, but where the law in order to promote a certain standard of conduct overlooks the defect, is illustrated by those laws which provide that when marriages are fraudulently performed, or performed without fulfilling the necessary legal prerequisites, they shall nevertheless be held lawful marriages if the parties acted in good faith, or if the party against whom the fraud was practised wishes the relation to continue.

Changing Legal Duty to Money Liability

To reduce all legal obligations to money liabilities would not be advisable, if it were possible. It would by the terms of the act make failure to obey the rule weigh heavily on the poor and lightly on the rich. But some laws are best enforced when a man feels that, unless he acts, the claim of the law against him may become transformed into a money liability. To command the doing of an act under liability to a suit for non-performance does not always bring the duty close enough to the citizen to make the sanction feared. But, if on failure to act as the law demands, some other person or official is authorized to act for him, after which the citizen becomes liable to have summary measures taken against him for collection of the expense, the sense of responsibility may be more acute.

Of this sort are the laws common in many states requiring domestic animals to be kept from wandering

[1] See Bates' Annotated Ohio Statutes, Vol. II, sec. 4270 (1787–1906).

on the public highways. They usually provide that any one taking up such estrays shall be paid for keeping them, or, the owner being unascertainable, he who has taken care of them may sell them to recoup his expenses.[1]

To promote the destruction of noxious weeds, it is provided in Wisconsin that certain officers shall appoint commissioners to investigate whether noxious weeds exist within their districts, and if after notice the owners of land neglect to destroy the weeds, the commissioner must destroy them, devoting "as many days to doing so as the officer appointing him shall direct." For the work the weed commissioner receives two dollars a day from the public treasury, and the treasurer who makes the payment enters the amount against the land on which the weeds were destroyed, in the next tax roll in a column headed, "for the destruction of weeds." The tax is collected as are other taxes.[2] Acts of this sort have been made to apply to the duty to destroy wild animals, to keep roads in repair, and the device is frequently used where a citizen is required by law to abate a nuisance. If he refuses to do so, some local authority is authorized to do the work in his stead and the attendant expense then becomes a money claim in favor of the public against him who should have done the work.

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[1] A recent example is Laws of Oregon, 1911, ch. 149.

[2] Laws of Wisconsin, 1901, ch. 424.

CHAPTER XXI

STATUTE LAW MAKING IN THE UNITED STATES

The importance of statute law in the life of every modern nation will continue to increase. A dynamic civilization necessitates easy and rapid adjustment of law to changing economic conditions. Law evolved by custom alone cannot keep up with the developments of our modern life, and the state must resort to new rules made to fit new conditions.

In all countries law — even statute law — must as a rule follow, not lead, economic and social advance. This is a difficulty inherent in the nature of the case; no one has prevision enabling him to shape the law to fit not what is but what will be. In the United States, where the written constitutions are interpreted by the courts, the difficulties are increased. The statute must not only fit the facts, but must be drawn so that it does not conflict with the principles laid down in the fundamental law. The problems of statute law which we must meet are therefore not only those which are inherent in legislation of all countries, but in addition involve conformity to the standards of the state and federal constitutions.

But the more difficult problem in all lawmaking is not that presented by the constitutional interpretations adopted by the courts. Comparatively few laws touch the bounds of legislative power. But in the drafting of every law it is always important to decide how best to accomplish the object sought and how to put it into clear

and forceful language. The number of acts which are stricken from our statute books because they offend the constitutions is relatively small. The number which are valid but forceless is legion. The constitutional measure is a minimum requirement only. Whether a law is properly so called, depends upon the degree to which it conforms to standards above that minimum and no less exacting.

Laws fail to carry out their purpose mainly for two reasons: either the command itself is not definite or there is no suitable administrative machinery to enforce its observance. Both elements are essential. A law, vague in its terms, full of pleonastic, contradictory phrases, is hard to enforce, and on the other hand, even if the command is clear, it will not be observed if proper machinery to carry it out is lacking. Constitutionality, clearness, and machinery of enforcement are the three elements upon which the success or failure of every act depends. The first has been made the subject of detailed study, the latter two have been given but slight attention in spite of the fact that the constitutional test is formal, too often divorced from actual conditions, and only in exceptional cases called in question, while clearness and enforceability are the living factors in the law which determine the degree to which it fits into the life of the community.

We have heretofore considered our statute law an anatomical rather than a psychological study. Statutes in the courts are defended and attacked to prove that they do or do not measure up to certain unchanging objective standards. Decisions do not teach what is the best expedient, but what is meant by the terms used and what is allowable under the constitutions.

Farther than this, the study of statute law must go. It is of the highest importance that we should broaden

our study of the statutes so as to include not only the problems which confront the lawyer who defends them in court, but those which confront the man who gives the statute its original form. The necessity of laws clear in language, definite in command, and strong in the hands of the administration, we have too long overlooked. Without such statutes, government must be feeble and representative institutions only an imperfect reflection of the popular will.

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